COMMERCE IN WAR

L·A·ATHERLEY-JONES

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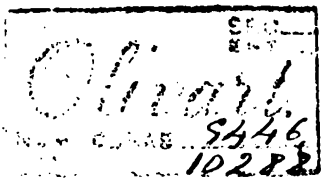

BY THE SAME AUTHORS

THE MINERS' GUIDE TO THE COAL MINES REGULATION ACTS

COMMERCE IN WAR

BY

L. A. ATHERLEY-JONES, K.C., M.P.

RECORDER OF NEWCASTLE-UPON-TYNE
OF BRASENOSE COLLEGE, OXFORD
AND OF THE INNER TEMPLE AND NORTH-EASTERN CIRCUIT

ASSISTED BY

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PREFACE

THE purpose of this work is to provide a full exposition of the rules of International Law which govern the commercial relations of the subjects of neutral and belligerent States.

In treatises which embrace the whole range of International Law it is impracticable to do more than refer to authority in support of the propositions of law that may be advanced; the more limited scope of this work has enabled me to give full quotations from treaties, ordinances, judgments, and the opinions of great jurists; thus the reader is spared the tedious task of continual reference to other books.

It is hoped that this treatise may prove useful not only to the lawyer, but to the shipowner and shipper, and also to that large class of public servants—diplomatists and consuls—who are compelled, many of them in remote parts of the earth, to discharge weighty and responsible functions in the protection of British commerce against the action of belligerents.

Mr. Hugh H. L. Bellot has been associated with me in the preparation of this book to such a degree indeed, that I feel the expression on the title page, which his modesty dictates—"assisted by"—inadequately denotes the large part he has taken in its production. It is unnecessary to say that his erudition and large experience as an author of books of law and general literature afford ample assurance of the excellence of his work.

My grateful acknowledgments are also due to Mr. T. Baty, D.C.L., one of the secretaries of the International Law Associa-

tion, whose repute as a writer on International Law gives peculiar value to the suggestions he has been good enough to make, and the many valuable emendations and additions he has contributed.

With his kind consent I dedicate this work to my Right Honourable friend Mr. Asquith, K.C., M.P., Chancellor of the Exchequer, who, felicitously for the purposes of this dedication, combines the attributes of a great lawyer and a distinguished statesman.

L. A. ATHERLEY-JONES

4 PAPER BUILDINGS, TEMPLE

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COMMERCE IN WAR

CHAPTER I

CONTRABAND

CONTRABAND of war, in the sense assigned by international law, means those things which, in accordance with the rules that by universal assent are binding on belligerent and neutral states, a belligerent state absolutely or conditionally forbids the subjects of neutral states to supply to its belligerent enemy.

The theory of contraband finds its origin in the natural desire of belligerents to impair the strength of their enemies by the total or partial suppression of their commercial intercourse with other nations.[1]

The modifying influence that restrains the belligerent from the application of this theory to the total suppression of all commerce between the subjects of neutral states and those of his enemy is to be found in the solicitude of neutral states to preserve their commerce, and in the practical recognition of the doctrine that war is a contention between states and not private persons, and is to be waged against the public forces of a state and not against its private citizens while in the pursuit of peaceful occupations. This doctrine is asserted by Gentilis in his treatise "De Jure Belli":[2] "Bellum est publicorum armorum justa contentio. . . . Neque enim bellum est rixa, pugna, inimicitia privatorum. Et publica esse arma utrinque debent."

In considering the law of contraband, it is necessary in the first place clearly to distinguish between the acts of a neutral state in its organic or corporate character and those of its subjects. The modern law of nations recognizes the right, apart from treaty obligations, of a sovereign state to observe peace while other nations are at war, but such right involves the reciprocal obligation to maintain an attitude of impartiality in all that pertains to the

[1] Dupuis, "Le Droit de la Guerre Maritime," c. VII., 236.
[2] Lib. I. c. II. See also Grotius "De Jure Belli," lib. I. c. II. and Vattel, lib. III. c. I. & XV.

carrying on of the war; it is true that this obligation may, perhaps, even at the present day, be subject to limitations resulting from treaties or even from circumstances which may oblige or cause a neutral state to extend favours to one belligerent to the prejudice of another.[1] Bynkershoek[2] gives the following definition of neutrals: "Non hostes appello qui neutrarum partium sunt nec ex foedere his, illis ve quiquam debent, si quid debeant federati sunt non simpliciter amici." This definition would appear too wide, and probably the most accurate and precise definition is that given by Calvo, "la neutralité est la non participation à une lutte engagée entre deux ou plusieurs autres nations,"[3] though it must be conceded that this definition is not exhaustive of the true meaning of the term neutrality.

But the neutral state is under an obligation to protect belligerents from certain hostile acts of her subjects. This obligation is indeed of comparatively recent recognition, and was at first grounded upon municipal law and not on any canon of international law.[4] By the common law no such obligation existed, and during a war between Russia and Sweden complaint was made by the latter country, then at peace with England, to the English Government that ships of war were being fitted out in English ports and sold to the Czar. The House of Lords, before whom the lawfulness of this act was in 1721 considered, ordered the judges to attend and give their opinion, and all save one answered that there was no power by law to prohibit the same.[5] A similar question came before the Supreme Court of the United States in the case of the *Independencia del Sud*,[6] which having been equipped and fitted out as a ship of war at Baltimore, in the territory of the United States, was sent to Buenos Ayres to be sold to the Government of that state, which was then at war with Spain.

In modern times neutral states have recognized the expediency of restraining their subjects from fitting out armaments, naval or military, or supplying levies for foreign belligerents, and in 1794 the United States enacted a law making it a misdemeanour to prepare a military expedition or to raise military levies or hire troops, or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a foreign nation with which the United States was at peace. The example of America was followed by England in passing "an Act to prevent the enlisting or engaging of His Majesty's subjects to serve in

[1] Vattel, lib. III. c. VI. s. 101 and c. VII. s. 103 *et seq.*
[2] "Quæstiones Juris Publici," lib. I. c. IX.
[3] "Le Droit International," vol. IV. s. 2493.
[4] Vattel, lib. III. c. VII. s. 110. [5] Fortescue's Reports, p. 388.
[6] 7 Wheaton's Rep., 285.

foreign service and the fitting out or equipping in His Majesty's dominions vessels for warlike purposes without His Majesty's license."[1]

But the capacity of a neutral state to prevent the levy or enlistment of troops within its territories arises primarily from her rights of sovereignty rather than from her duties as a neutral. Wolfius points out that it is a violation of sovereign right to levy troops in a foreign country without the license of its Government. "Quoniam nemini in alieno territorio militem conscribere licet invito superiore, si quis legere audet, jus gentis violat ac ideo injuriam eidem facit, cumque injuria haec crimen sit a peregrino commissum, peregrini autem in territorio alieno delinquentes juxta leges loci puniendi sint, si peregrinus in territorio alieno invito superiore militem legere audet, deprehensus puniri potest."[2]

In another place will be discussed the rules of international and municipal law in respect of the fitting out of armaments by the subjects of a neutral state for the service of a belligerent; for the present purpose it is sufficient to observe that the obligation of a neutral state to prohibit the rendering of military or naval assistance to a belligerent is confined to cases of levying of troops or fitting out or provision of armaments for a direct hostile expedition, naval or military, within its territories, and that, in the absence of any treaty with a foreign state by which the Government of a neutral state is bound not to suffer its subjects to supply contraband to a belligerent enemy of that state,[3] the subjects of a neutral state are entitled to carry on their usual commercial intercourse with belligerent states in all things contraband or otherwise, subject to the risk of capture and forfeiture or other penalty, at the hands of the belligerent enemy of the state to which they may attempt to export contraband.

It has recently been urged that neutrals might well bargain for immunity from the vexations of visit and search for their vessels, by undertaking to prevent the export of contraband and the sailing of blockade-runners. Such surveillance to be effective, would involve enormous expense, and would substitute the certainty of continual vexation to commerce on land for the possibility of naval interference. Even then, belligerents would constantly find occasion for complaints of the inefficacy of the measures taken.

In discussing the law of contraband of war, jurists for the most part have accepted the view of Grotius that articles of commerce in relation to the rights of belligerents and neutrals may be

[1] 59 Geo. III. c. LXIX., and 33 & 34 Vict. c. XC., and *see postea* p. 437.
[2] Jus Gentium, s. 754. *Brig Alerta*, 9 Cranch, 365.
[3] *Neutralitet*, 3 Rob., 295 (1801), *vide postea*, p. 207.

divided into three classes—(1) those which are useful only for the purposes of war; (2) those which manifestly cannot serve such purposes; and (3) those *ancipitis usus*, i.e. that may be useful for the purposes of war or peace indiscriminately.[1] He thus states his view: "Sed et quæstio incidere solet, quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de ea re acriter certatum scimus, cum alii belli rigorem, alii commerciorum libertatem defenderent.

"Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantum usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ in bello et extra bellum usum habent ut pecuniæ, commeatus et naves et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. Sic Seneca tyranno gratiam se relaturum ait, si beneficium illi neque vires majores daturum est ad exitium commune, neque confirmaturum quas habet, id autem est quod reddi illi sine pernicie publica possit: quod explicans addit: pecuniam, quæ satellitem stipendio teneat non subministrabo, si marmora et vestes desiderabit, nihil oberit cuiquam id quo luxuria ejus instruitur; militem et arma non suggeram. Si pro magno petet munere artifices scenæ et quæ feritatem ejus emolliant, libens offeram. Cui triremes et æratas non mitterem, lusorias et cubiculatas et alia ludibria regum in mari lascivientium mittam. Et Ambrosio judice largiri ei qui conspiret adversus patriam non est probabilis liberalitas.

"In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus jus dabit sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato ut qui debitorem carceri exemit aut fugam ejus in meam fraudem instruxit et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causa quæri poterit. Si damnum nondum dederit sed dare voluerit jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus aut ullo modo. Quod si præterea evidentissima sit hostis mei in me injustitia et ille eum in bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pænis

[1] "De Jure Belli," lib. III. c. 1. s. 5.

diximus; quare intra eum modum etiam spoliari poterit. Et has ob causas solent a bellum gerentibus publicæ significationes fieri ad alios populos, tum ut de jure causæ, tum etiam de spe probabili juris exequendi appareat.

"Hanc autem quæstionem ad jus naturæ ideo retulimus quia ex historiis nihil comperire potuimus ea de re jure voluntario gentium esse constitutum. Romanos qui Carthaginiensium hostibus commeatus attulerant, ipsi Carthaginienses aliquando ceperunt, eosdem iidem Carthaginienses repetentibus Romanis reddiderunt. Demetrius cum Atticam teneret exercitu, jamque vicina oppida Eleusina et Rhamnuntem cepisset Athenis famem facturus navis frumentum inferre parantis et magistrum et gubernatorem suspendit atque eo modo deterritis ceteris potitus urbe est."

With regard to this classification by Grotius of articles of commerce, the advance of science has transformed things which were formerly innocuous, into objects capable of becoming, by the facile application of some mechanical treatment, the most powerful instruments of war; such, for instance, is cotton, which can, under the hand of the chemist, be rendered a most powerful explosive; and so the introduction of steam navigation and the railway has rendered coal, machinery, and certain classes of iron and steel manufacture as much, under certain circumstances, obnoxious to the belligerent as in earlier times were sails, cordage, hemp, and tar.

But in addition to cotton, coal, machinery, and railway plant, things which in themselves constitute no small portion of the world's commerce, there are many other things in constant use for the peaceful purposes of mankind which may, under certain conditions and circumstances, be justly regarded and treated by a belligerent as contraband, nor is it material what the intent of the merchant or shipper may be; it is enough that the captor is entitled to infer from the facts of its nature and destination that the commodity will find its way into the military or naval service of his belligerent enemy; and his action in seizing the commodity will be confirmed by the Prize Court if he establish that his view of its ultimate destination was correct, notwithstanding the intent as to destination of the shipper or carrier.

Whatever, indeed, may be the controversies of jurists, to which is added further confusion in the conflicting decisions of Prize Courts and the inconsistencies of ordinances and treaties, the only safe course to be followed by the merchant and carrier is to recognize that articles whose intrinsic character is such that they may be useful for the purposes of war, are likely to be treated as contraband until these questions receive some settlement.

But, on the other hand, the general trend of international law,

as evidenced by treaties, ordinances, and judgments, has been, despite some notable aberrations, to limit the rights of belligerents against neutral commerce, and to restrain them from extending the right of unqualified capture beyond those things which are primarily useful for warlike purposes, and may directly assist the belligerent in his naval or military operations. And this is believed to be the prevalent view taken on the Continent at the present time.[1]

It is, however, true that a right of qualified capture (subject to pre-emption) was conceded by the Institute at Venice in 1896, in cases where other goods were susceptible of military use.[2]

Gentilis,[3] indeed, in 1583, some forty years before the work of Grotius was published, thus broadly enunciates the principle which should govern the action of belligerent States in relation to commerce: "Est æquo æquius et favorabili favorabilius et utili utilius. Lucrum hi commerciorum sibi perire nolunt. Illi nolunt quid fieri quod contra salutem est. Jus commerciorum æquum est, et hoc æquius tuendæ salutis; est illud gentium jus, hoc naturæ est, est illud privatorum hoc regnorum."

Gentilis in this passage draws a distinction between international and natural law. Apart from this somewhat unnecessary antithesis, his observations scarcely warrant the criticisms that some jurists[4] have passed upon them to the effect that they sanction the most arbitrary acts and the most extravagant pretensions upon the part of belligerents. They appear rather to indicate that private rights can only be respected during war so long as their exercise does not conflict with the safety of States, to wit, with the right of self-preservation, and would seem inferentially to impose a greater limitation upon the rights of belligerents than what has been in practice accorded or recognized as necessary or just by the great bulk of judicial or juridical authority, which extends the right of belligerents to interfere with the commerce of neutrals not merely so far as may be necessary for preserving their own safety, but for the purpose of impairing the enemy's power of offence or resistance.

The theory of contraband[5] was recognized in very early times, as the references in the passage of Grotius above cited show,[6] but it was only with the advance of civilization that the theory found expression in international rules and regulations, which placed upon a fairly intelligible and reasonable basis the relations between neutrals and belligerents in respect of their commercial intercourse.

[1] "Annuaire de l'Institut de Droit International," XV. p. 205 *et seq.*
[2] *Ibid.*, p. 230. [3] Alberic Gentilis, "De Jure Belli."
[4] Calvo, lib. V. s. 2709.
[5] Ital. *contra*, against; and *bando*, proclamation or statute: late Latin, *bandum*, *bannum*, *confer* bandom, ban. [6] *Ante*, p. 4.

The first glimpses we secure of a tendency towards the recognition of some certain principle upon which the law or custom of contraband should rest are to be found in treaties of alliance and amity between sovereign states, and therefore for the purpose of appreciating how the modern doctrine of contraband has, with some approach to certainty and precision, been established, it is well to trace its gradual evolution through the operation of treaties, ordinances, and judgments.

The earliest instances of reducing into the form of an ordinance the doctrine of contraband are to be found in the ordinances of the Emperors Valentinian, Gratian, Honorius, Marcian, and Theodosius.[1] Article XLI of the "Codex Justinianus" runs as follows: "Ad Barbaricum transferendi vini et olei et liquaminis nullam quisquam habeat facultatem ne gustus quidem causa aut usus commerciorum.

"Nemo alienigenis barbaris cujuscumque gentis ad hanc urbem sacratissimam sub legationis specie vel sub quocumque alio colore venientibus aut in diversis aliis civitatibus vel locis loricas et scuta et arcus, sagittas et spathas et gladios vel alterius cujuscumque generis arma audeat venumdare, nulla prorsus isdem tela, nihil penitus ferri vel facti jam vel adhuc infecti ab aliquo distrahatur. Perniciosum namque Romano imperio et proditioni proximum est barbaros quos indigere convenit telis eos, ut validiores reddantur instruere—si quis autem aliquid armorum genus quarumcumque nationum barbaris alienigenis contra pietatis nostræ interdicta ubicumque vendiderit bona ejus universa proscribi protinus ac fisco addici, ipsam quoque capitalem pænam subire decernimus."

The policy pursued by the Roman emperors in relation to traffic with Barbarians was copied by the Pontificate regarding trade by Christians with the Saracens,[2] and in the year 1179 the Lateran Council promulgated the following canon: "Ita quorundam animos occuparit sæva cupiditas, ut cum glorientur nomine Christiano, Saracenis arma, ferrum et lignamina galearum deferant, et pares eis, aut etiam superiores in malitia fiant, dum ad impugnandos Christianos, arma eis et necessaria subministrant. Sunt etiam qui pro sua cupiditate in galeis et piraticis Saracenorum navibus regimen et curam gubernationis exerceant. Tales igitur a communione ecclesiæ præcisos, et excommunicationi pro suâ iniquitate subjectos et rerum suarum per sæculi principes catholicos et consules civitatum privatione mulctari et capientium servos, si capti fuerint fore censemus. Præcipimus etiam ut per ecclesias

[1] "Codex Justinianus," lib. IV. art. XLI.

[2] *Vide* Canon 24 of the Third Council of the Lateran ("Coleti Collectio Conciliorum," vol. XIII.).

maritimarum urbium crebra et solemnis excommunicatio proferatur in eos. . . ."

The first treaty in which we can discover any attempt at precision in defining contraband, and any sure recognition of the duties of a neutral State in relation thereto, is that made in the year 1604 between England, Spain, and Burgundy,[1] of which Article IV states—

"That neither of the parties shall afford nor consent to their vassals, subjects, or inhabitants affording assistance, favour, or counsel, directly, or indirectly, either by land, sea, or fresh water, nor furnish, nor consent to his said vassals, inhabitants, or subjects furnishing soldiers, provisions, money, arms, ammunition, or any other kind of assistance to foment war with the enemies or rebels of the other party, of whatsoever sort they be, either invading the kingdoms, countries, and dominions of the other, or withdrawing themselves from the obedience of the other."

This treaty is interesting. The term contraband is not used, neither is any power expressly given, nor any recognition accorded, to the rights of visit, search, capture, or prize; but, on the other hand, in the widest possible terms prohibition is imposed upon the neutral State and its subjects from furnishing the belligerent enemy with commodities "to foment" war. Moreover, provisions (*vivres*) and money are expressly included among prohibited things, and, what is entirely in conflict with later doctrines and practice, there is imposed upon the neutral State the duty to take care that its subjects shall not supply prohibited things to the enemy.

By a treaty between Great Britain and Spain, made in 1604,[2] we find a description of prohibited contraband identical with that of the treaty already cited :—

"And as the said kings solemnly promise never to give any warlike assistance to the enemies of either, it is further provided that their subjects or inhabitants, of whatever nation or quality they be, shall not, either on pretence of trade or commerce, or under any other colour, assist the enemies of the said princes, or of either of them, in any manner, nor furnish them with money, provisions, arms, engines, guns, or instruments fit for war, nor afford any other warlike furniture; and all contraveners shall be liable to the severest punishment as covenant-breakers and seditious persons."

In 1614 a treaty was entered into between Sweden and the Low Countries[3] which presents many points of similarity to that last cited, but it should be observed that this treaty partakes of the nature of an offensive and defensive alliance. Article V

[1] *Vide* "A General Collection of Treaties between 1495 and 1712," published by Knapton and others in 1732.

[2] "A Complete Collection of Marine Treaties," published by J. Millan, 1779.

[3] Dumont, vol. V. part ii. p. 245.

thus enunciates the mutual obligation of the two States in respect of rendering assistance to the enemies of either:—

"Et comme il n'importe pas peu a sa Susditte Majesté d'une part et leur Hautes Puissances les Seigneurs États Generaux d'autre que leurs ennemis ne puissent se renforcer en quelque maniere que ce soit, les uns ni les autres ne permettront pas que les ennemis d'à present ni ceux de cy aprés puissent jamais être assistez de conseils, gens, argent, munitions de guerre, victuailles ou semblables assistances de leurs sujets mais ils concourront a deffendre qu'ils soient aidez d'aucune chose qui pourroit faire réussir leurs desseins."

In the year 1625, for the first time, the term contraband was employed in a treaty, for the purpose of designating things which a neutral, or at any rate an ally—for the treaty in question was in the nature of an alliance, defensive and offensive, between Great Britain and the Low Countries[1]—was prohibited from supplying to a belligerent enemy of the State with which the treaty was made. It was made in the year that the work of Grotius, who does not employ the term "contraband," was published. The three articles of the treaty, below quoted, are interesting because of the wide interpretation which is placed upon the word contraband, the uses of the term "neutral," the recognition of a duty on the part of a neutral State to prohibit its subjects from carrying contraband to an enemy, the imposition of the obligation not to carry goods extending not only to the seat of war, but to all colonies and dependencies of the belligerent enemy, and, finally, the recognition of the duty on the part of naval officers not to interfere with legitimate commerce. It is noteworthy that distinction is not drawn between absolute and conditional contraband, which forms so marked a feature in the doctrines of Grotius and the later jurists. It should also be noted that this is one of the few treaties which include ships as things which cannot lawfully be carried to a belligerent; and it went very far in including metals of various kinds without regard to their unwrought state.

"Article XX. All contraband goods, such as ammunition and provisions, ships, arms, sails, cordages, gold, silver, copper, iron, lead, and the like designed to be carried by any one from any port into Spain or into any other dominions under the obedience of the said King of Spain or his adherents, shall be good prize, together with the men and ships that carry them.

"Article XXI. His said Majesty shall deal with other neutral kings, princes, states, towns, and communities to forbid their subjects to trade, during this present war, with the kingdoms and other possessions of the said King of Spain and of his adherents so they may not run any hazard.

"Article XXII. Which if it cannot be obtained, it is agreed that the

[1] A collection of treaties published by Knapton and others in 1732, p. 248.

ships which shall be found at sea and suspected of taking their course towards Spain, the isles or other states of the said King of Spain and his adherents, shall be obliged to stop, to be known and visited, but not retarded or endamaged."

There are interesting letters in the year 1626 of the Mareschal de Bassompierre,[1] the French Ambassador in London, who complained to the English Government of the capture by English warships of French vessels carrying goods to the belligerent enemy of England. Commissioners were appointed by England to inquire into the complaint, and the commissioners thus stated what they conceived to be the law of contraband then obtaining in Europe. "Que c'est une coutume usiteé et pratiquée, et une loy establie et observée entre les roys et princes, que lors qu'aucun d'eux est en guerre avec un autre, il est aussy défendu par exprès aux marchands trafiquans originaires des princes neutres, de ne prester leur nom, ny intervention, pour faire porter, passer, débiter ou vendre aux autres marchands des pays guerroyans leur marchandises et denrées ni les mesler avec les leurs, sur peine, non seulement de confiscation desdites marchandises ennemies, mais aussy de celles qui leur appartiendront et de leur navires et équipages.

"Et au cas que les marchands des pays neutraux trafiquent de leurs marchandises sur les vaisseaux et navires des marchands sujets des princes guerroyans si lesdits navires sont pris, lesdites marchandises sont tenues et déclarées de bonne prise et confisquées sur lesdits marchands des pays neutraux.

"Il est aussi défendu aux marchands neutraux de faire compagnie ny association avec les marchands des pays guerroyans, sur peine de confiscation de leur marchandises au cas qu'elles soient imiscées avec celles desdits marchands des pays qui sont en guerre."

To this response of the English commissioners the French Ambassador made the following reply: "Le Marechal de Bassompierre convient que les marchands des pays neutres ne doivent porter dans leurs navires, ny faire passer sous leur nom et adveu les denrées des marchands des pays guerroyans, mais il déclare que les vaisseaux des dits marchands neutres et les marchandises qui véritablement leur appartiennent ne sont pas pour cela confiscables, ains seulement les estrangères qu'ils auront avouées."

In his comment upon the above reply of the English commissioners the Marshal thus writes: "Finalement, il faut spécifier quelles sortes de marchandises sont déclarés contrebande; car

[1] See Ortolan, "Règles Internationales, et Diplomatie de la Mer," vol. II. pp. 113, 185; also Bassompierre's "Embassy to England," published by Murray, 1819.

messieurs les commissaires entendent toutes sortes de vivres, et munitions de guerre, et le Mareschal de Bassompierre s'arreste à ce qui a esté déclaré contrebande par le passé et rien de plus."

As already stated, the great work of Grotius was published in 1625, and its effect in causing a distinction to be drawn in subsequent treaties between things necessarily of military or naval use and these *ancipitis usus* is noticeable. In 1646 a treaty was entered into between France and the United Provinces,[1] and in this treaty we find that contraband is distinctly limited to munitions of war and horses, with the express provision that corn and provisions may not be carried to a place "attaquée" by either of the contracting parties. Probably the proper meaning to be given to this word is "invested." In Article I contraband is described as follows:—

"Poudres, mousquets et toutes sortes d'armes, munitions, chevaux et équipages servans à la guerre."

The treaty goes on to provide that ships

"même ne pourront porter ny transporter des hommes pour la service des ennemis, auquel cas le tout sera de bon prise, navires appareils et marchandises. Ce qui cera aussi sévèrement pratiqué à l'égard de ceux qui auront secouru et jetté des hommes, blez et vivres dans une place attaquée par les armées de sa Majesté."

In 1642 a treaty of alliance and friendship was entered into between England and Portugal.[2] Calvo[3] refers to this treaty as an instance of the right being conceded by treaty to a neutral to carry contraband including arms and munitions of war to a belligerent enemy of the treaty-making states. Two years before the making of this treaty Portugal had thrown off the yoke of Spain, but the war between the two countries lasted for many years,[4] and under the peculiar and unsettled conditions of the provinces of Spain at this period one is not able to attach a very high importance to the exceptional character of the provisions of this treaty relating to contraband.

Calvo also refers to a treaty made in 1647 between Spain and the Hanseatic towns[5] as conceding a mutual right on the part of treaty-making Powers to carry to the belligerent enemies of either contraband of war, but he appears to have overlooked in Article III the words "à la reserve de celles qui sont à l'usage de la guerre."

[1] Dumont, "Recueil des Traites," vol. VI. part i, p. 342.
[2] *Ibid.*, vol. VI. part i. p. 238; see Article VI.
[3] Calvo, "Le Droit International," vol. V. sec. 2714.
[4] B. St. Hilaire, "Histoire d'Espagne," vol. XI.
[5] Dumont, vol. VI. part i. p. 403.

"Que supposé qu'il se commit des actes d'hostilité entre les Provinces-Unies et sa Majesté ou quelqu' autre ennemi que ce pût etre, les villes Hanseatiques jouiront du benefice de la Neutralité, que l'on ne refuse pas même aux ennemis de sa Majesté, et il leur sera aussi permis de negocier en quelque tems que ce puisse être avec les Provinces-Unies et avec quelques autres ennemis de sa Majesté que ce soit, d'aller et venir dans leurs païs et de conduire et voiturer des marchandises par terre ou par mer, à la reserve de celles qui sont à l'usage de la guerre . . . des terres de la domination Espagnole; et en ce cas là, pourveu qu'il n'y ait point de fraude, on observera ce qui est porté par l'Article XI dudit traité de 1607 à condition de ne point emmener de marchandises d'Espagne dans lesdites Provinces-Unies, et d'observer tout ce qui est d'obligation à l'egard de l'introduction des marchandises dans les places du païs ennemi."

In Article XI of a treaty made in 1654 between England and Sweden,[1] we find the following provision for the protection of neutral commerce:—

"Quamvis superioribus articulis hujus fœderis ac amicitiæ legibus prohibitum sit neutrum confæderatorum alterius hostibus auxilium atque subsidium præstiturum; subintelligi tamen nullo modo debet commercia et navigationem illi confæderato ejusque subditis et incolis, qui bello non est immixtus, cum hostibus illius fæderati qui in bello versatur omnino denegata esse. Cautum tantummodo sit interim, donec ritè magis de omnibus huc pertinentibus legibus convenerit nullas ejusmodi merces *contrabandæ* vocatas de quarum speciali designatione vel catalogo intra quatuor adhuc menses ritè conveniet ad hostes alterius devehendas esse, sine periculo, si ab altero fæderatorum deprehendantur, quod prædæ cedant, absque spe restitutionis."

The supplementary treaty was made at Westminster in 1656,[2] and Article II is as follows:—

"Whereas in the eleventh article of the treaty lately made at Upsal in 1654 betwixt England and Sweden it was agreed and specified what goods and merchandise should hereafter be declared contraband and prohibited; it is now, by virtue of the said article, established that only those hereafter mentioned shall be reckoned prohibited; and consequently not to be disposed of to the enemies of either: viz. bombs with their fuses and other appurtenances, fireballs, gunpowder, matches, cannon-ball, spears, swords, lances, pikes, halberds, guns, mortars, petards, granadoes, musket-rests, bandaliers, saltpetre, muskets, musket-balls, helmets, head-pieces, breast-plates, coats of mail, cuirasses, and the like kind of arms, soldiers, horses with all their furniture, pistols, holsters, belts, and all other warlike instruments, and also ships of war. Money shall also be reckoned among the goods with which the enemy are not to be supplied, and which it shall not be lawful to be carried to the enemies of either, any more than the things above-mentioned, on the penalty of being made prize, without hopes of redemption, if they are seized by either of the confederates. Nor shall either of the confederates permit that the enemies or rebels of the other be

[1] Dumont, vol. VI. part ii. p. 80. See also Hertslet, vol. II. p. 310.
[2] Hertslet, vol. II. p. 317.

assisted by any of their subjects, or that their ships be sold, lent, or in any manner made use of by the enemies or rebels of the other to his disadvantage or detriment."

Article III makes the following broad declaration as to general trading between a belligerent and neutrals :—

"But it shall be lawful for either of the confederates and his people or subjects to trade with the enemies of the other, and to carry them any goods whatsoever, which are not excepted as above, without any impediment, provided they are not carried to those ports or places which are besieged by the other, in which case they shall have leave to sell their goods to the besiegers or to repair with them to any other port which is not besieged."

It is material to notice that in this treaty the list of contraband, which appears to have been carefully considered by the two countries, both then of considerable naval power, does not include sails, cordage, copper, lead, iron, or provisions.

However, by Article XI of a further treaty made between the same states[1] at Whitehall in 1661, "provisions" were added to the list of contraband.

This treaty, moreover, is important in that it attempts to make an exhaustive list of contraband goods, and this list, as will be seen, with occasional exceptions or additions (such as the inclusion of ships and money), is almost identical with those which were adopted in most of the treaties entered into between European states. It also expressly recognizes the right of commerce by neutrals with belligerent enemies in all but the excepted articles—save only in that they may not carry articles of any sort to ports that are besieged.

In 1654 a treaty was made at Westminster between England and the United Provinces.[2] Article IX is as follows :—

"Item, quod neutra dictarum rerumpublicarum, populusve alterutrius hostem vel hostes rebellem vel rebelles, profugum vel profugos alterius reipublicæ declaratos vel declerandos in ejus dominia, terras, regiones, portus, sinus aut districtus eorumve aliquod recipiet, neque iis, vel eorum alicui in prædictis locis vel alio quocunque etiam extra sua dominia, patrias, regiones, terras, portus, sinus aut districtus, auxilium, consilium, hospitium, milites, naves, pecunias, arma, apparatum bellicum vel commeatum concedet, præbebit aut ministrabit neve alteruter status istiusmodi hostes, rebelles, profugos a quacunque persona vel personis recipi permittet in sua dominia, patrias, regiones, terras, portus, sinus, districtus, nec istiusmodi hostibus, rebellibus, profugis, ullum auxilium, consilium, hospitium, favorem, arma, apparatum, milites, naves, pecunias aut commeatum præstari, ministrari aut concedi permittet se expresse et cum effectu contradicet obstabit atque impedimentum realiter præstabit."

[1] Hertslet, vol. II. p. 328.
[2] Dumont, vol. VI. part ii. p. 74.

This was a very close treaty of alliance. It was even thought by some that the commonwealths of Britain and Holland might form an incorporate union in the near future. The list is therefore very full, and comprises ships, money, and provisions. Curiously, as in the Anglo-Dutch treaty of 1625, it does not mention horses, which are henceforward uniformly included, on the French model of their treaty of 1640 with Holland. The concluding engagement to prohibit contraband traffic is noticeable.

Article II of a treaty made at Paris in 1655 between France and the Hanseatic towns[1] defines contraband not to be carried

"aux pais et places ennemis de la couronne. . . . Lesquelles marchandises de contrebande sont entendues être munitions de guerre, armes à feu [here follows list of arms and equipments], poudre, meche, salpestre, . . . des chevaux, des cordages et des toiles noyales, qui ne puisse servir qu'à faire voiles: pourront néanmoins porter des bleds et grains de toutes sortes, legumes et autres choses servans à la vie, si ce n'est que les villes et places où ils les transporteront fussent attaquées par sa majesté, et que volontairement ils les y transportassent, sans y être forcez par les ennemis de sa majesté, et se servant par violence de leurs vaisseaux trouvez dans leurs ports, ou ailleurs; auquel cas pourront les commandans des vaisseaux de sa majesté retenir lesdits grains et autres choses servans à la vie, en payant leur juste valeur, suivant l'estimation qui en sera faite, sinon et à faute d'estimation et de payement en deniers comptans; les sujets des dites villes anseatiques pourront se retirer librement avec leurs vaisseaux et marchandises, si ce n'est qu'elles fussent de la qualité de celles specifiés cy-dessus pour être de contrebande. Ne voulant sadite majesté que les capitaines de ses vaisseaux puissent arrester aucuns navires appartenans aux Habitans desdites villes anseatiques que ceux qui se trouveront chargez de marchandises de contrebande, lesquelles seront jugées suivant les ordonnances du Royaume, de François Premier année 1554, et de Henry Troisième 1584.[2] Et s'il se trouvoit desdites contrebandes sur des vaisseaux desdits habitans chargez à cueuillette en un ou plusieurs lieux, elles seront confisquées purement et simplement sans que les autres marchandises ni le vaisseau le puissent être et celui qui les aura chargées sera tenu à tous les dépens, dommages et interests soufferts pour raison de ce par les interressez aux vaisseaux, et ce cas arrivant il sera jugé selon la rigueur du present Article et non suivant lesdites ordonnances, et ce faisant et après le Jugement rendu, le vaisseau pourra partir librement avec le reste de sa charge, et pour cet effet seront les Officiers de l'Admirauté tenus de proceder incessamment au jugement desdite prises."

This treaty leaves entirely alone the position of ships and money regarded as possible subjects of contraband, as was the French practice. It is peculiar, however, in including *cordages et toiles noyales*, and seems to be the only French treaty in which the diplomatists of that country have embodied the view that naval stores should be regarded as contraband. It is peculiar,

[1] Dumont, vol. VI. part ii. p. 103.
[2] "Recueil d'anciennes lois," vols. XII and XIV.

again, in being apparently the first treaty to make specific exceptions to the list of contraband articles. For at least thirty years[1] the question of confiscating provisions had been more or less acute, and it appears to have been felt dangerous to leave the matter open. Henceforward we have a series of express exemptions, to which even England under the Restoration was brought to assent. It was not for twenty years more that the position of naval stores reached the same acute stage. At the moment, France was willing to include them.

In the next treaty it will be seen that the French and English interests came in contact. It was accordingly silent on the subjects of money and provisions, with regard to which different policies were pursued by each; and less intelligibly, on the subject of naval stores.

Articles XV of a treaty made at Westminster between France and England in 1655:—[2]

"Quod donec de malis et incommodis quæ super mari poterunt accidere tollendis certius atque alsolutius quid statuatur, convenit uti in spatium quattuor annorum Ratificationem præsentis tractatus proxime insequentium omnes naves ad subditos et populares alterutrinque pertinentes et in mari Mediterraneo orientale seu oceano negotiantes liberæ sint atque etiam onus suum liberum reddant, licet in iis invehantur mercimonia imo grana leguminave quæ alterutrius hostium sint exceptis nihilominus et reservatis mercimoniis vetitis et contrabandis, i.e. pulvere nitrato, sclopis seu tubis ferreis atque omne genus armis, munitione, equis, bellicoque apparatu, neque viros trajicient aut transportabunt in usum hostium alterutrius quo in casu tam naves quam apparatus et mercimonia legitimæ prædæ erunt. Quod etiam severe exercebitur in eos qui viros frumentum seu victualia quibuscumque locis inferent ab utralibet parti obsessis."

The treaty between France and Spain made in 1659 and known as the Treaty of the Pyrenees[3] is important, inasmuch as in express terms (like the treaty of 1655 between France and the Hanseatic towns) it recognizes the freedom from contraband of provisions save to places blockaded or invested.

"Article XII. En ce genre de marchandises de contrebande s'entend seulement estre comprises toutes sortes d'armes à feu et autres assortissemens d'icelles: comme canons, mousquets, mortiers, petards, bombes, grenades, saucisses, cercles poissez, affusts, fourchettes, bandolieres, poudres, mêches, salpestre, balles, picques, espées, morions, casques, cuirasses, hallebardes, javelines, chevaux, selles de cheval, fourneaux de pistolets, baudriers et autres assortissemens servans à l'usage de la guerre.

"Article XIII. Ne seront compris en ce genre de marchandises de

[1] See p. 10, *supra*.
[2] Dumont, vol. VI. part ii. p. 122.
[3] *Ibid.*, vol. VI. part ii. p. 266.

contrebande les fromens, bleds et autres grains, legumes, huiles, vins, sel, ny generalement tout ce qui appartient à la nourriture et sustentation de la vie: mais demeureront libres comme toutes autres marchandises et denrées non comprises en l'article precedent; et en sera le transport permis, mesme aux lieux ennemis de la couronne d'Espagne sauf en Portugal, comme il a esté dit et aux villes et places assiegées, bloquées ou investies."

The treaty between Portugal and the United Provinces, made at La Haye in 1661,[1] is interesting as constituting the second instance of a treaty entered into by Portugal wherein she concedes, and there is conceded to her, the unrestrained right to carry contraband of war to the belligerent enemies of either of the contracting parties. Article XII of the treaty provides as follows:—

"Liberum præterea Belgarum Fœderatorum populo ac permissum sit præter mercis omne genus arma etiam res bellicas et annonam tam ex Fœderatarum Belgii provinciarum quam ex aliis quibusvis portubus ac terris in quascunque orbis regiones et ad quascunque gentes transferre tam inimicas regi regnoque Lusitaniæ quam amicas ac fœderatas nec dicto Regi ejusve subditis aut ministris huic rei moram aut impedimentum afferre liceat per detentiones, repressalias, pignorationes ullove alio modo sive id directe aperteque sive oblique ac occulte fiat, dummodo dictus fœderatorum Belgarum populus ex ipsis portubus Lusitanis armorum nihil apparatus aut rerum bellicarum ad dicti Regis regnique hostes et adversarios transvectet; nec minus iisdem fœderatis Belgis integrum relinquatur ac permittatur in universam ditionem dicti regis quascunque merces res etiam ad armaturam, bellum ac militarem annonam pertinentes inferre easque non minus magnâ quam exiguâ copiâ venales exponere. . . ."

In 1662 France and the United Provinces entered into a treaty of alliance, commerce,[2] and navigation, in which the provisions of Articles XXVIII and XXIX, dealing with contraband, are identical with those of the treaty between France and Spain, made in 1659.[3] Unlike the treaty of France with the Hanseatic League,[4] these were silent on the subject of "cordages et voiles."

In a treaty between Great Britain and Spain, made at Madrid in 1667,[5] it is provided as to contraband as follows:—

"Article XXIV. Il a esté en outre declaré et accordé que pour mieux prevenir les differens, qui pourroient arriver touchant la qualité des marchandises deffendües et de contrebande que sous ce nom là seront comprises toute sorte d'armes à feu, comme d'artillerie mousquets, mortiers, petards, bombes, grenades, saucisses, boulets à feu, fourchettes, bandolieres, poudres, mêche, salpêtre, balles, comme aussi que sous le nom de mar-

[1] Dumont, vol. VI. part ii. p. 368. *See* p. 11 *ante*.
[2] *Ibid.*, vol. VI. part ii. p. 414.
[3] *Vide ante*, p. 15. [4] *Vide ante*, p. 14.
[5] Dumont, vol. VII. part i. p. 30.

chandises deffendües seront comprises et entendües toutes autres sortes d'armes comme picques, espées, morions, casques cuirasses, hallebardes, javelines et toutes autres sortes d'armes et que sous ce nom on deffend encore le transport de soldats, de chevaux, leurs harnois, pistolets, fourreaux, baudriers et autres assortissemens servans à l'usage de la guerre.

"Article XXV. Il a été pareillement convenu et accordé que pour prevenir toute sorte de disputes et de contestations sous le nom de marchandises deffendües et de contrebande, ne seront point compris les fromens, bleds, orges, et autres grains ou legumes, sel, vinaigre, huile et generallement tout ce qui appartient à la nourriture et sustentation de la vie, mais qu'ils demeureront libres; comme pareillement toutes autres marchandises non comprises en l'article precedent et le transport en sera libre et permis même aux villes et places ennemies, à l'exception des villes et places assiegées, blocquées ou investies."

This treaty marks the subjection of Britain to French ideas. But for the mention of "soldats" it is on precisely the same lines as the Franco-Spanish and Franco-Dutch treaties of 1659 and 1662. Money is not included, and provisions are carefully exempted. A similar treaty with Holland (which did not include "soldats") followed immediately.

In 1668 Great Britain entered into a treaty with the United Provinces made at La Haye.[1] Article I provides for general freedom of commerce on behalf of the subjects and inhabitants of both the contracting states, and then proceeds as follows:—

"Article II. Quæ navigandi commercandique libertas se extendet ad omnes omnino mercimoniorum species, iis duntaxat exceptis, quæ contrabandæ indigitantur.

"Article III. Quo in numero solummodo comprehendentur omne genus arma igniaria et quæ eo spectant, ut machinæ seu tormenta bellica, bombardæ, mortariæ, piloclastra vulgo petardæ, bombæ, mala punica, vulgo granadæ, saucisæ, coronæ piceæ, machinarum vehicula vulgo assutæ, thecæ sclopetariæ, balthea, pulvis pyrius, funes igniarii, nitrum, globi, hastæ, gladii, galeæ, cassides, loricæ, bipennes, lanceæ, equi, ephippia, minorum tuborum sive sclopetorum equestrium vaginæ aut reconditoria, cinguli, cæteraque instrumenta, quæ formam acceperunt ut in bello usui esse possint, gallice dicta *assortiments servans à l'usage de la guerre*."

In a treaty made at Copenhagen between Great Britain and Denmark in 1670,[2] we find the unusual provision[3] that both of the contracting parties shall be under the obligation of proceeding against their respective subjects who might carry contraband to the belligerent enemies of either. Article III provides that the contracting parties "undertake and promise that they will not aid or furnish the enemies of either party that shall be

[1] *Ibid.*, vol. VII. part i. p. 74.
[2] *Ibid.*, vol. VII. part i. p. 133.
[3] See also the treaties of 1604 (England-Spain-Burgundy) and of 1654 (Britain-Holland), *ante*, pp. 8 and 13.

aggressors with any provisions of war, such as soldiers, arms, engines, guns, ships, or other necessaries for the use of war, or suffer any to be furnished by their subjects, but if the subjects of either prince shall presume to act contrary hereunto, then that they whose subjects shall have so done shall be obliged to proceed against them with the highest severity as against seditious persons and breakers of the league."

By a treaty made in 1674 between Great Britain and the United Provinces[1] an attempt is made to set out exhaustive lists of articles to which the law of contraband shall and shall not apply.

"Article III. Sub isto nomine contrabandæ seu mercimoniorum prohibitorum solummodo comprehendentur arma, bombardæ, cum suis ignariis et aliis ad eas pertinentibus, ignes missiles, pulvis tormentarius, fomites, globi, cuspides, enses, lanceæ, hastæ, bipennes, tormenta, tubi catapultarii, vulgo mortaria, inductiles sclopi, vulgo petardæ, glandes, igniarii missiles, vulgo grenadæ, furcæ sclopetariæ, *bandeliers*, salpetræ, sclopeti, globuli seu pilæ, quæ sclopetis jaculantur cassides, galeæ, thoraces loricati, vulgo *cuirasses*, et similia armaturæ genera, milites, equi, omnia ad instruendos equos necessaria, sclopethecæ, balthei et quæcunque alia bellica instrumenta.

"Article IV. Inter bona prohibita haudquaquam censebuntur hæc quæ sequuntur mercimonia, omnes scilicit pannorum species omnesque aliæ manufacturæ textæ ex quacunque lanâ, lino, serico, gossipio vel aliâ quacunque materiâ, omnia vestium et indumentorum genera, una cum speciebus ex quibus confici solent, aurum et argentum tam signatum quam non signatum, stannum, ferrum, plumbum, cyprium et carbones focarii, triticum etiam et hordeum et aliud quodcumque frumenti vel leguminis genus, herba nicotiana vulgo tabaco necnon omne genus aromatum, carnes salitæ et fumo duratæ, pisces saliti et arefacti, caseus et butyrum, cervisia olea, vina, sacchara et omne genus salis necnon omnis generatim annona quæ ad victum hominum et vitæ sustentationem facit: gossipii porro, cannabis, lini et picis omne genus, funes, vela et anchoræ, mali item navales ut et asseres, tabulæ et trabes ex quibuscumque arboribus, omniaque alia ad naves seu construendas seu reficiendas comparata, quin plane inter mercimonia libera censebuntur, juxta atque aliæ quælibet merces et res quæ in articulo proxime præcedenti non comprehenduntur; ita ut a subditis Regiæ Majestatis antememoratæ etiam ad loca dominis ordinibus[2] inimica ut et a subditis dominorum ordinum vice versa ad loca hostibus domini Regis obtemperantia, liberrime transportari et invehi possint exceptis duntaxat Oppidis locisve obsidione cinctis, circumseptis vel investitis, Gallice *blocquées ou investies*."[3]

It will be seen that this treaty and the Anglo-French one of 1677[4] mark a still further step in the progress of restrictive

[1] Dumont, vol. VII. part i. p. 282.

[2] The Estates General.

[3] On the 8th March, 1675, a supplementary treaty of one article was made between England and France (Dumont, vol. VII. part i. 288), whereby it was agreed that should any dispute arise between the two countries the same should be referred to arbitration.

[4] *Post*, p. 19.

doctrine. Britain now agreed to the express exemption of money, as well as of provisions. Naval stores receive the same exemption. Henceforward troops (which it had generally been the British practice to include in conventional stipulations as contraband) disappear for a time from the list; this treaty is the last which so includes them until we come to a treaty in 1803 between Great Britain and Sweden.

By a treaty made at St. Germain in 1677 between France and England,[1] in Article III "arms, munitions of war, saltpetre, horses, harness and "assortimens façonnez et formez à l'usage de la guerre" are declared contraband.

Article IV, following very much the precedent of the treaty between England and the Low Countries last quoted, provides as follows:—

"Au nombre des marchandises de contrebande et défenduës ne sont comprises les marchandises suivantes: Sçavoir les etoffes et manufactures de laine, lin, soye, coton, et de quelque autre matiere que ce soit; toutes sortes d'habits et vestemens, et les etoffes et sortes desquelles on les fait, or et argent monnoyé ou non monnoyé, estain, fer, plomb, cuivre, charbon, blez, orges et autres grains et legumes, tabac, espiceries, chairs salées et fumées, poisson sec et salé, fromage, beurre, biere, huile, vin, sucre, sels et tout ce qui appartient à la nourriture et sustentation de la vie. Ne seront aussi compris dans les marchandises defenduës les cotons, chanvres, lins, poix, cordages, voiles, ancres, mats, planches, poultres et bois travaillé de toute espece d'arbres et qui peut servir à construire des vaisseaux ou à les radouber: et demeureront les dites marchandises libres, de même que toutes les autres generalement qui ne sont comprises dans l'article precedent. De telle sorte que les sujets du serenissime roi très-chrétien pourront en faire le transport non seulement d'un lieu où il y ait neutralité à un autre lieu où il y ait aussi neutralité; ou d'un lieu ou port où il y ait neutralité en un autre qui soit ennemi du serenissime roi de Grande Bretagne; ou enfin d'un endroit ennemi en un endroit où la neutralité soit gardée, mais encore d'un port ou autre lieu appartenant aux ennemis dudit seigneur roi, en un autre appartenant aussi à ses ennemis, soit que ses ports ou autres lieux soient sous l'obeissance d'un seul prince ou état, ou de plusieurs princes ou états avec lequel ou avec lesquels le dit seigneur roi de la Grande Bretagne soit en guerre."

The article goes on to give reciprocal rights to the other contracting power, and finally provides "Ne pourra néanmoins ledit transport être fait aux villes et places assiegées ou bloquées ou investies."

By a treaty made at Nimeguen, in 1678, between France and the United Provinces,[2] Article XV declares contraband to be weapons, munitions, saltpetre, horses and their saddles, "et autres assortimens servans à l'usage de la guerre."

[1] Dumont, vol. VII. part i. p. 328.
[2] *Ibid.*, vol. VII. part i. p. 359.

"Article XVI. Ne seront compris dans ce genre de marchandises de contrebande les froments, bleds et autres grains, legumes, huiles, vins, sel ni generalement tout ce qui appartient à la nourriture et sustentation de la vie, mais demeureront libres comme autres marchandises et denrèes non comprises en l'article precedent et en sera le transport permis mesme aux lieux ennemis desdits seigneurs états sauf aux villes et places assiegées, blocquées, ou investies."

The exemption of provisions was not in terms extended to money and stores. Probably it was not thought necessary.

By an Ordonnance de la Marine, made by France in 1681, it was decreed (Article XI) as follows:—

"Les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages qui seront transportées pour le service de nos ennemis, seront confisqués en quelque vaisseau qu'ils soient trouvés et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés."

By Article II of a treaty between Great Britain and Algiers, made at Algiers in 1682,[1] and renewed by treaty made in 1729, the following things are described as contraband absolute: "powder, brimstone, iron, planks and all sorts of timber fit for building of ships, rope, pitch, tar, fusils, and other habiliments of war."

Not much reliance can be placed on inferences drawn from a Moorish treaty, but it is evident that naval stores at least would not long retain the exemption which France and Holland had extorted from Britain.

Article XIII of a treaty made in 1701[2] between Denmark and the United Provinces provides as follows:—

"Sous ce nom de marchandise de contrebande on entendra seulement toutes sortes de feux d'artifice et ce qui y appartient, comme canons, mousquets [and other arms], salpêtre, chevaux, selles, fourreaux de pistolet, ceinturons, voilage, cordage, poix, goudron et chanvre outre tout ce qui sert à l'équipement par mer et à la guerre par terre, sans y comprendre aucune autre marchandise de quelle nature quelle puisse être; mais il sera permis au sujets de part et d'autre de transporter lesdites marchandises dans des pais ennemies d'y en aller querir excepté dans les villes, forteresses, chateaux et ports assiegéz."

Naval stores are here again included: and we shall see them included even by France in 1742.

By Article XIX of the treaty of Utrecht,[3] made in 1713 between France and Great Britain, it is provided that arms and

[1] Dumont, vol. VII. part ii. p. 20.
[2] *Ibid.*, vol. VIII. part i. p. 35.
[3] *Ibid.*, vol. VIII. part i. p. 348.

munitions of war, saltpetre, horses and their equipment shall alone be contraband.

"Article XX enacts: On ne mettra point au nombre des marchandises deffendues celles qui suivent, sçavoir toutes sortes de drap, et tous ouvrages de manufactures de laine, de lin, de soye, de coton et de toute autre matière, tous genres d'habillement avec les choses qui servent ordinairement à les faire, or, argent, monnoyé et non monnoyé, estain, fer, plomb, cuivre, laiton, charbons à fourneau, bled, orge et toute autre sorte de grains et de legumes, la nicotiane, vulgairement appellée tabac, toutes sortes d'aromates, chairs salées et fumées, poissons salez, fromage et beurre, biere, huile, vins, sucres, toutes sortes de sels et de provisions servant à la nourriture et à la subsistance des hommes, tous genres de cotons, chanvre, lin, poix tant liquide que sèche, cordages, cables, voiles, toiles propres à faire des voiles, ancres et parties d'ancres, quelles qu'elles puissent être, mats de navires, planches, madriers, poutres de toute sorte d'arbres et toutes les autres choses necessaires pour construire ou pour radouber les vaisseaux; On ne regardera pas non plus comme marchandises de contrebande, celles qui n'auront pris la forme de quelque instrument ou atterail servant à l'usage de la guerre sur terre ou sur mer, encore moins celles qui sont preparées ou travaillées pour tout autre usage. Toutes ces choses seront censées marchandises libres de mesme que toutes celles qui ne sont pas comprises et specialement désignées dans l'article précedent ensorte qu'elles pourront estre librement transportées par les sujets des deux Royaumes même dans les lieux ennemis excepté seulement dans les places assiegées, blocquées et investies."

Article XXI of the treaty provides that the merchant vessels of each of the contracting parties shall carry a certificate setting forth particulars concerning the vessel, the character of its cargo, and its destination.

The treaty made also at Utrecht between France and the United Provinces in 1713,[1] in its enumeration of contraband articles follows the classification of the treaty between England and France of the same year (Article XIV), but Article XX does not attempt nearly so exhaustive a list of merchandise not to be accounted contraband. The article is as follows:—

"Ne seront compris dans ce genre de marchandises de contrebande les froments, bleds et autres grains, legumes, huiles, vins, sel ni generalement tout ce qui appartient à la nourriture et sustentation de la vie, mais demeureront libres, comme autres marchandises et denrées non compris en l'article precedent et en sera le transport permis mêmes aux lieux ennemis desdits Seigneurs Etats sauf aux villes et places assiegées, blocquées ou investies."

By a treaty between France and the Hanseatic towns made at Paris in 1716,[2] Article XIV confines contraband to arms and munitions of war, saltpetre, horses and their saddles, "et tous les autres assortimens servans à l'usage de la guerre."

[1] *Ibid.*, vol. VIII. part i. p. 377. [2] *Ibid.*, vol. VIII. part i. p. 478.

Article XV provides:—

"Ne seront compris dans ce genre de marchandises de contrebande les fromens, bleds et autres grains, legumes, huiles, vins, sel ni generalement tout ce qui sert à la nourriture et sustentation de la vie, mais au contraire, les dites denrées demeuroront libres comme les autres marchandises non comprises dans l'article précedent, quand même elles seroient destinées pour une place ennemie de sa majesté, à moins que ladite place ne fût actuellement investie, blocquée ou assiegée par les armes de sa majesté, ou qu'elles appartinssent aux ennemis de l'état, auquel cas lesdites marchandises et denrées seront confisquées."

Article XVI permits the vessel upon which contraband may be found to go free.

Article XVIII of a treaty made between Sweden and Great Britain in 1720[1] is interesting because it omits to particularize what are articles of contraband, and assumes that there is a general consensus of opinion among nations as to what constitutes contraband:—

"Et quamvis Fœderati auxilia sibi invicem mittere modo superius dicto teneantur, ista obligatio tamen neutiquam eo extendi debet, ut propterea omnis protinus amicitia et mutuorum commerciorum usus cum alterius Fœderati hostibus, eorumque subditis omnino tollendus et interdicendus veniat; nam existente tali casu quod unus confœderatorum etiam si auxilia requisitus tulerit, bello ipse non fuerit immixtus, ejus subditis ac incolis cum hostibus illius Fœderati qui in bello versatur commercia et navigationes libera erunt, licitumque omnino erit merces ipsis quascunque advehere, iis tantummodo exceptis quæ expressè vetitæ, vulgo contrabandæ dictæ, et communi omnium nationum consensu tales declaratæ sunt."

By a treaty of amity, commerce, and navigation made in 1734 between Great Britain and Russia,[2] it is provided by Articles XI and XII as follows:—

"Article XI. The subjects of either party may freely pass, repass, and trade in all countries which now are or hereafter shall be at enmity with the other of the said parties provided they do not carry any warlike stores or ammunition to the enemy, as for all other effects, their ships, passengers, and goods shall be free and unmolested.

"Article XII. Cannons, mortars, firearms, pistols, bombs, granadoes, bullets, balls, fuzees, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, pouches, cartouche boxes, saddles and bridles in any quantity beyond what may be necessary for the ship's provision, and may properly appertain to and be judged necessary for every man of the ship's crew or for each passenger, shall be deemed ammunition of war, and if any such then be found they may seize and confiscate the same according to law; but neither the vessels, passengers, or the rest of the goods shall be detained for that reason or hindered from pursuing their voyage."

[1] Dumont, vol. VIII. part ii. p. 20.
[2] "A Complete Collection of Marine Treaties," published by J. Millan in 1779.

By a treaty made between France and Holland in 1739,[1] the same description of articles contraband of war is given as is contained in the treaty between France and Spain in 1659.[2]

In an ordinance of the King of France, made 21 October, 1744,[3] it is provided as follows :—

"Article III. Comme aussi leur fait défenses d'arrêter les navires appartenans aux sujets des dits Princes neutres, sortis des portes d'un état neutre ou allié de Sa Majesté, pour s'en aller en un autre état pareillement neutre ou allié de Sa Majesté, pourvu qu'il ne soit chargé de marchandises du cru ou fabrique de ses ennemis au quel cas les marchandises seront de bonne prise et les navires rélâchés.

"Article IV. Defend pareillement Sa Majesté aux dits armateurs d'arrêter les navires appartenans aux sujets des dits princes neutres, sortis des ports d'un état allié a sa Majeste ou neutre, pour aller dans un port d'un état ennemi de sa Majeste pourvu qu'il n'y ait sur le dit navire aucunes marchandises de contrebande, ni du cru ou fabrique des ennemis de Sa Majesté, dans le quel cas les dites marchandises seront de bon prises et les navires seront rélâchés."

By Article X of a treaty made in 1766 at St. Petersburg between Great Britain and Russia,[4] it is provided :—

"Tous les canons, mortiers, armes à feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres à feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, épées, ceinturons, poches à cartouche, selles et brides à delà de la quantité qui peut être necessaire pour l'usage du vaisseau ou à delà de celle que doit avoir chaque homme servant sur le vaisseau et passager seront reputés munitions ou provisions de guerre, et s'il s'en trouve ils seront confisqués selon les lois comme contrebande ou effets prohibés, mais ni les vaisseaux ni les passagers ni les autres marchandises qui s'y trouveront en même temps ne seront point detenus ni empêchés de continuer leur voyage."

By a manifesto of Russia in 1772[5] she declares :—

"Que dès aujourd'hui tous les navires marchands, qui feront voile pour les ports ennemis avec des chargemens de provisions de guerre ou de bouche et qui auront ainsi à bord des choses qui procurent à l'ennemi des moyens essentiels de pousser la guerre seront non seulement arrêtés mais pris et confisquès sans le moindre dedommagement pour ceux qui les ont frettés . . . et en même tems nous réitérons notre declaration qu'à l'exception des munitions mentionnés toutes autres sortes de marchandises seront non seulement libres et franches mais aussi protégées et defendues."

By a circular[6] to the officers of their navy, made in 1777, the

[1] Merlin, "Repertoire de Jurisprudence," Vol. XXV, sec. 3, Art. III, p. 90.
[2] *Vide ante*, p. 23.
[3] Valin, "Ordonnance de la Marine," Vol. II, p. 250.
[4] Martens, "Traités, Conventions, etc," Vol. I, p. 45.
[5] *Ibid.*, Vol. II, p. 35.
[6] *Ibid.*, Vol. III, p. 17.

United States of America limit the right to seize neutral vessels to those having on board soldiers, arms, munitions, provisions, and other contraband intended for the British army and its warships.

A regulation of the King of France, made in 1778,[1] without defining contraband, directs that neutral ships on which contraband may be found shall be released after confiscation of contraband, and only made prize if three parts of their whole cargo be contraband.

It may be worth noting that in 1776[2] an ordinance was issued by Great Britain declaring all ships, neutral or otherwise, lawful prize if trading or proceeding to or returning from trade with any of the American colonies then in rebellion.

Article XXIV of a treaty between the United States of America and France, made in 1778, provides as follows :—[3]

"The liberty of navigation and commerce shall extend to all kinds of merchandise, excepting only those which are distinguished by the name of contraband, and under this name of contraband or prohibited goods shall be comprehended arms, great guns, bombs, with all the fusees and other things belonging to them, cannon-ball, gunpowder, metal pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, muskets, musket-ball, bucklers, helmets, breast plates, mail and the like kind of arms proper for arming soldiers, musket rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandize which follow shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing apparel, together with the species whereof they are used to be made; gold and silver, as well coined as uncoined; tin, iron, latten, copper, brass, coals, as also wheat and barley, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oil, wines, sugars, and all sorts of salts, and in general all provisions which serve for the nourishment of mankind and the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors and any parts of anchors; also ship's masts, planks, boards, and beams of what trees soever, and all other things proper either for building and repairing ships, and all other goods whatever which have not been worked into the form of any instrument or thing prepared for war by land or sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use: all which shall be wholly reckoned among free goods: as likewise all other merchandise and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods, so that they may be transported and carried in the freest manner by the subjects of both confederates even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested."

[1] Martens, Vol. III, p. 19.
[2] *Ibid.*, Vol. III, p. 105.
[3] State Papers, Vol. V, p. 6.

In 1780 the maritime supremacy of England caused her to renew her attempt to extend the doctrine of contraband so as to include almost all articles of commerce. It was this attitude of England which led to what is termed the Armed Neutrality of 1780, the immediately provoking cause of which was the seizure by England of two Russian ships laden with corn, which were believed to be destined for Gibraltar. By a declaration of 1780, Russia asserted that Articles X and XI of her treaty with England in 1766 were conclusive of what constituted contraband,[1] and to this declaration the following Powers subscribed: Denmark, Sweden, Holland, Prussia, Austria, Portugal, the Two Sicilies, France, Spain, and the United States, then at war with England. The result of this action of the other Powers, while failing to cause the withdrawal by England of her pretensions, was to induce her to exercise her alleged rights with greater moderation.

Later on, the outbreak of the French Revolution caused the allied Powers arbitrarily to enlarge the list of articles contraband of war, and they went so far as to treat as contraband provisions and foreign merchandise which were being carried to any French port. France on her part retaliated by interdicting neutrals from supplying her enemies with corn or provisions; but pretensions so preposterous were scarcely attempted to be enforced, and were tacitly abandoned by all parties.

This declaration of Russia was coincident with a treaty made by her in 1780 with Sweden.[2] Article III declares these rights as follows:—

"La contrebande determinée et exclue du commerce des nations neutres en conformité des traités et stipulations expresses, subsistantes entre les hautes parties contractantes et les Puissances en guerre et nommément en vertu du traité de commerce conclu entre la Suède et la Grande Bretagne le 21 Octobre, 1661, et du traité preliminaire de commerce entre la Suède et la France fait en 1741, ainsi que du traité de commerce conclu entre la Russie et la Grande Brétagne le 20 Juin, 1766. Sa Maj. le Roi de Suède et Sa Maj. Impériale de toutes les Russies entendent et veulent que tout autre trafic soit et reste parfaitement libre. Leurs Majestés après avoir deja réclamé dans leurs declarations faites aux Puissances belligerantes les principes generaux du droit naturel dont la liberté du commerce et de la navigation de même que les droits des peuples neutres sont une conséquence directe ont résolu de ne les point laisser plus long temps dépendre d'une interpretation arbitraire, suggerée par des intérêts isolés et momentanés.—Dans cette vue elles sont convenues.

"(1) Que tout vaisseau peut navigeur librement de port en port et sur les côtes des nations en guerre.

[1] *Vide supra*, p. 23.
[2] Martens, *ut supra*, Vol. III, p. 198.

"(2) Que les effets appartenans aux sujets des dites puissances en guerre soient libres sur les vaisseaux neutres à l'exception des marchandises de contrebande."

By a declaration of Great Britain and Denmark, made in 1780, and renewed by the Treaty of Kiel in 1814, Article III of the 1670 treaty was explained as follows:—

"In order to leave no doubt upon what is to be understood by the term contraband, it is agreed that this denomination is meant only to comprehend arms" (and here follows a list of arms), "matches, saltpetre, horses, saddles, belts, and generally all other warlike implements; also ship timber, tar, pitch, and rosin, sheet copper, sails, hemp, and cordage, and generally whatever immediately serves for the equipment of vessels; unwrought iron and deal planks, however, excepted.

"But it is expressly declared that this kind of contraband merchandise shall by no means comprehend fish and flesh, fresh or salted; wheat, flour, corn, or other grain, vegetables, oil, wine, and generally what serves for the nourishment and support of life, so that all these articles may always be sold and transported like other merchandise, even to places in the possession of an enemy of the two crowns, provided that such places are neither besieged nor blockaded."

In a treaty made in 1782 between the United Provinces and the United States of America,[1] by Article XXIV contraband is strictly confined to arms, munitions of war, horses, and harness. The article goes on to declare:—

"Tous autres effets et marchandises non specifies ci-dessus expressement et même toutes sortes de matieres navales quelque propres qu'elles puissent être a la construction et à l'equipment de vaisseaux de guerre ou à la fabrique de l'une ou l'autre machine de guerre terrestre ou maritime ne seront ainsi censés ni à la lettre, ni selon quelque interpretation pretendue d'icelle quelconque, devoir ou pouvoir être compris sous les effets prohibés et de contrebande; en sorte que tous ces effets et marchandises, qui ne se trouvent pas expressement nommée ci-dessus pourront sans aucune exception et en toute liberté, être transportés par les sujets et habitans des deux allies des places et vers les places appartenans à l'ennemi, excepté seulement les places, qui, dans le même temps, se trouveront assiégées blocquées ou investies et pour telles sont tenues uniquement les places entourées de près par quelqu'une des puissances belligerantes."

By Article XXI of a treaty made between Russia and Denmark in 1782[2] contraband is strictly confined as follows:—

"On ne comprendra sous la rubrique de contrebande que les choses suivantes; comme canons, mortiers, armes à feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres à feu, mêches, poudre, salpêtre, souffre, cuirasses, piques, epées, ceinturons, poches à cartouches, selles et

[1] Martens, Vol. III, p. 451.
[2] *Ibid.*, Vol. III, p. 474.

brides, en exceptant toutefois la quantité qui peut être necessaire pour la défense du vaisseau et de ceux qui en composent l'équipage: et tous les autres articles quelconques non désignés ici ne seront réputés munitions de guerre et navales, ni sujettes à confiscation, et par consequent passeront librement sans être assujettis à la moindre difficulté."

It will be observed that horses are not accounted contraband either in this treaty or in that made by Russia in the same year with the United States of America, and that the list, while made subject to no express detailed exceptions, is drawn up in the narrowest terms. This is for the future a notable characteristic of Russian treaties.

By a treaty made at the Hague in 1785 between the United States of America and Prussia[1] it was provided by Article XIII:—

"Dans le cas où l'une des parties contractantes se trouverait en guerre avec une autre puissance, il a été convenu que pour prevenir les difficultés et les discussions qui surviennent ordinairement par rapport aux marchandises ci-devant appellées de contrebande telles que armes, munitions et autres provisions de toute espèce, aucun de ces articles chargés à bord des vaisseaux des citoyens ou sujets de l'une des parties et destinés pour l'ennemi de l'autre ne sera censé de contrebande au point d'impliquer confiscation ou condamnation et d'entrainer la perte de la propriété des individus. . . ."

By Article XXII of a treaty between Great Britain and France at Versailles in 1786[2] it was provided:—

"On comprendra sous ce nom de marchandises de contrebande, ou defendues les armes, canons, arquebuses, mortiers, petards, bombes, grenades, saucisses, cercles-poissés, assuts, fourchettes, bandoulieres, poudre à canon, mèches, salpètre, balles, picques, epées, morions, casques, cuirasses, halbardes, javelines, fourreaux de pistolet, baudriers, chevaux avec leurs harnois et tous autres semblables genres d'armes et d'instruments de guerre servant à l'usage des troupes."

"Article XIII. On ne mettra point au nombre des marchandises defendues celles qui suivent, savoir, toutes sortes de draps, et tous autres ouvrages de manufacture de laine, de lin, de soie, de coton, et de toute autre matière, tous genres d'habillemens avec les choses qui servent ordinairement à les faire, or, argent, monnoié ou non monnoié, etains, fer, plomb, cuivre, laiton, charbon à fourneau, bled, orge et toute autre sorte de grains et de legumes, le tabac, toutes sortes d'aromates, chairs salies et fumies, poissons salés, fromages et beurre, bières, huiles, vins, sûcre, toutes sortes de sels et de provisions servant à la nourriture et à la subsistance des hommes, tous genres de coton, cordages, cables, voiles, toile propre à faire des voiles, chauvre, suif, goudron, brai et resine, ancres et parties d'ancres, quelles qu'elles puissent être, mâts de navires, planches madriers, poûtres de toutes sortes d'arbres et de toutes les autres choses necessaires pour construire ou pour radouber les vaisseaux. On ne regardera pas non plus comme marchandises de

[1] *Ibid.*, Vol. IV, p. 43.
[2] *Ibid.*, Vol. IV, p. 169.

contrebande celles qui n'auront pas pris la forme de quelque instrument ou atterail servant à l'usage de la guerre sur terre ou sur mer encore moins celles qui sont preparées ou travaillées pour tout autre usage. Toutes ces choses seront censées marchandises non defendues, de même que toutes celles qui ne sont pas comprises, et specialement designées dans l'article precedent; en sorte qu'elles pourront être librement transportées par les sujets des deux Royaumes, même dans les lieux ennemis excepté seulement dans les places assiegées, blocquées et investies."

Article XXIII of a treaty between Russia and the Two Sicilies, made in 1787 at Zarskoe Selo,[1] is a reproduction of Article XXI of the treaty of 1782 between Russia and Denmark.[2]

A declaration of the Russian Government, made at St. Petersburg in 1789,[3] after stating that the policy of the Russian Government had ever been to afford protection to commerce in the Baltic under the neutral flag, goes on to say that no obstacle is to be put by the Russian authorities in the way of merchantmen of neutral Powers, and that they are to be rendered by the authorities all assistance in their power; but it qualifies this by observing:—

"En exceptant seulement de ce nombre les bâtimens marchands qui viendront porter des munitions de guerre aux ennemis de la Russie attendu que celles-ci, selon l'usage universellement reçu, sont envisagées comme contrebande et susceptibles de confiscation."

By a rescript of the King of Denmark, made in 1793,[4] it is provided as follows:—

"Article IV. Unter der Bennennung von Kriegs-Contrebande werden einzig feuergewehre und audere Art Waffen als Kanonen, flinten, mörser, etc. verstanden worüber die Tractaten nachzusehen.

"Article V. Aber unter Kriegs-contrebande versteht man nicht, etc. Siehe die Tractaten."

In 1793 England, during her war with the French Republic, frequently violated the usage of nations as to contraband, and in consequence of her seizure of neutral ships conveying food and other non-contraband merchandise to the ports of France, the Republic, by way of reprisal, issued a decree in 1793[5] authorizing her ships of war and privateers to seize and make prize of all cargoes of food or other merchandise destined for hostile ports. The decree proceeds as follows:—

"Dans tous les cas les navires neutres seront relâchés au moment où le déchargement des comestibles arrêtés ou des marchandises saisies aura

[1] Martens, Vol. IV, p. 239.
[2] *Ante*, p. 26.
[3] *Ibid.*, Vol. IV, p. 428. *Ibid.*, Vol. V, p. 381.
[4] Martens, *ut supra*, Vol. V, p. 557.

été effectué. Le fret en sera payé au taux qui aura été stipulé par les chargeurs. Une juste indemnité sera accordée à raison de leur détention par les tribunaux qui doivent connoître de la validité des prises.

"La presente loi, applicable à toutes les prises qui ont éte faites depuis la déclaration de guerre cessera d'avoir son effet dès que les puissances ennemies auront déclaré libres et non saisissables quoique destinés pour les ports de la Republique les comestibles qui seront propriétés neutres et les marchandises chargées sur des navires neutres qui appartiendront au gouvernement ou aux citoyens Français."

In a treaty between Russia and Sweden, made at Petersburg in 1800,[1] Article II provides as follows :—

"Pour prévenir toute équivoque ou malentendu sur ce qui doit être regardé comme contrebande S. M. le roi de Suede et S. M. l'Empereur de toutes les Russies déclarent qu'elles ne reconnaissent pour contrebande que les objets suivans, savoir, canons, mortiers, pistolets, bombes, granades, boulets, fusils, pierres à feu, mèche, poudre, salpêtre, souffre, cuirasses, piques, epées, ceinturons, gibernes, scelles et brides, à l'exception de la quantité de ces choses qui pourrait être nécessaire à la défense du batiment et de l'équipage. Tous les autres articles qui ne sont point ici désignés ne doivent point être regardés comme munitions de guerre ni de marine ni être sujets à confiscation et par consequent doivent passer librement et sans difficulté. On est aussi convenu que le present article ne prejudiciera en rien aux dispositions particulières de traités conclus antèrieurement avec les puissances belligerantes dans lesquels il aurait stipulé des reserves, defense ou permission relativement à des objets de pareille nature."

This treaty, commonly known as the Second Armed Neutrality, and to the provisions of which other Powers, viz. Denmark, etc., gave adhesion, was preceded by a preamble, which asserted in solemn form the right of neutral nations as follows :—

"La liberté de la navigation et la sureté du commerce des puissances neutres ayant été compromises dans la présente guerre, et les principes du droit des gens méconnus, S. M. le roi de Suede et S. M. l'Empereur de toutes les Russies guidés par leur amour de l'equité et leur commune sollicitude pour tout ce qui peut contribuer à la prosperité publique dans leurs états, ont jugé convenable de donner une nouvelle sanction aux principes de neutralité, qui de leur nature indestructibles, n'exigent pour être respectés que l'accession des puissances interessées à leur maintien. C'est dans cette vue que S. M. I. par sa déclaration du 15 Août aux cours du Nord qu'une parité d'interet et de circonstances invite à prendre les mêmes mesures, leur a temoigné combien elle desiroit de retablir dans son inviolabilité le droit commun qu'ont tous les peuples de naviguer et de commercer librement et independamment de l'interet momentané des puissances belligerantes. . . ."

The attitude of Russia in respect of contraband of war was emphatically enunciated in her famous declaration of 21 February,

[1] *Ibid.*, Vol. VII, p. 516.

1780, and her laudable desire was "d'établir un système naturel et fondé sur la justice et qui par son avantage réel servit de règle aux siècles à venir."[1] It is not here the place to discuss this branch of the subject; but equally important with her desire to place definite limits upon what should constitute contraband was her assertion of the inviolability of merchant ships sailing under convoy of neutral men-of-war from visitation or search on declaration of the officer commanding the man-of-war that the merchant vessel carried no contraband. Before the war of 1793 with France broke out, there was a general consensus of opinion among the Powers that corn and provisions should be excluded from contraband, saving, of course, the case of their being in transit to places blockaded or besieged; but in 1793 England, Russia, and Prussia made common cause to replace corn and provisions in the list of contraband on the shallow pretext that the rights of neutrals should be in abeyance during a war carried on against the Revolutionary Government of France.

By a treaty made at St. Petersburg between Russia and Great Britain in 1801,[2] after reciting the desire of the contending parties to establish fixed principles respecting the rights of neutrals, Article III provides as follows:—

"(1) Que les vaisseaux de la puissance neutre pourront naviguer librement aux ports et sur les côtes des nations en guerre.

"(2) Que les effets embarqués sur les vaisseaux neutres seront libres à l'exception de la contrebande de guerre et des propriétés ennemies; et il est convenu de ne pas comprendre au nombre des dernières les marchandises du produit, du crû ou de la manufacture des pays en guerre, qui auroient été acquises par des sujets de la puissance neutre, et seroient transportées pour leur compte; les quelles marchandises ne peuvent être exceptées en aucun cas de la franchise accordée au pavillon de la dite puissance.

"(3) Que pour éviter aussi toute équivoque et tout mésentendu sur ce qui doit être qualifié de contrebande de guerre sa Maj. Imp. de toutes les Russies et sa Maj. Britannique déclarent conformément à l'art. XI du traité de commerce conclu entre les deux couronnes le 10 (22) Février 1797 qu'elles ne reconnoissent pour telles que les objets suivans, sçavoir, 'canons, mortiers, armes à feu, pistolets, bombes, grenades, boulets, balles, fusils, pierres à feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, epées, ceinturons, gibernes, selles et brides,' en exceptant toutefois la quantité des susdits articles qui peut être necessaire pour la défense du vaisseau et de ceux qui en composent l'équipage; et tous les autres articles quelconques non désignés ici ne seront pas réputés munitions de guerre et navales ni sujets à confiscation et par conséquent passeront librement sans être assujettis à la moindre difficulté, à moins qu'ils ne puissent être réputés propriétés ennemies dans le sense arrêté ci-dessus. Il est aussi

[1] See Martens, "Supplement au Recueil des Traités de l'Europe," Vol. II, p. 344.
[2] *Ibid.*, "Supplement," II, p. 476. See also *Ibid.*, III, p. 192.

convenu que ce qui est stipulé dans le present article ne portera aucun préjudice aux stipulations particulières de l'une ou de l'autre couronne avec d'autres puissances par lesquelles des objets de pareil genre seroient réservés, prohibés ou permis."

Article XIII of an Ordinance of the King of Denmark, dated 4 May, 1805,[1] declares the following to be contraband of war :—

"Canons, mortiers, armes de toute espece, pistolets, bombes, grenades, boulets, balles, fusils, pierres à feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, epées, ceinturons, gibernes, selles et brides, en exceptant toutefois la quantité qui peut être necessaire pour la défense du vaisseau et de ceux qui en composant l'équipage."

Articles I and IV of a treaty made to explain Article XI of the treaty of 1661 between Great Britain and Sweden, made at London in 1803,[2] provide as follows :—

"Dans le cas qu'une des parties contractantes restât neutre dans une guerre, dans laquelle l'autre partie contractante seroit belligerante, les bâtimens de la puissance neutre ne pourront conduire à l'ennemi ou aux ennemis de la puissance belligerante de l'argent monnoyé, des armes, bombes avec leur fusées et appartenances, carcasses, poudre à tirer, mèches, boulets, lances, épees, piques, hallebardes, canons, mortiers, petards, fourches de mousquets, bandoulieres, salpêtre, mousquets et leurs balles, casques, morions, cuirasses ou cottes de maillés ou autres espèces d'armes, des troupes, chevaux ou rien de ce qui est nécessaire à l'équipement de la cavalerie, pistolets, ceinturons, ou d'autres instruments de guerre, vaisseaux de guerre ou de garde ni aucun article manufacturé servant immédiatement à leur équipement, et cela sous peine de confiscation quand ces articles seront saisis par l'une ou l'autre des parties contractantes.

"Article IV. Le hareng, fer en barres, acier, cuivre rouge, laiton et fil de laiton, planches et madriers, hors ceux de chêne et esparres ne seront point soumis à confiscation, ni au droit de préemption de la part de la puissance belligerante, mais ils pourront passer librement dans les bâtimens du pays neutre, bien entendu qu'ils ne seront point propriété ennemie."

After a long interval, we find Great Britain once more including money, ships, and troops in the category of contraband. On the other hand, naval stores are expressly exempted (except when manufactured).

By a regulation of the King of Sweden, made in 1804,[3] it is declared in Article VI :—

"Pour éviter toute équivoque et tout mal-entendu sur le qui doit être proprement qualifié de contrebande de cette nature, nous declarons qu'on ne comprend sous cette denomination que les marchandises suivantes comme : canons, mortiers, armes a feu, pistolets, bombes, grenades, boulets

[1] *Ibid.*, III, p. 528.
[2] *Ibid.*, III, p. 525.
[3] *Ibid.*, III, p. 547.

de toutes espèce, fusils, pierres à feu, mèches, poudre, salpêtre, soufre, cuirasses, piques, epées, ceinturons, gibernes, selles et brides, en exceptant toutefois la quantité de tous ces objets qui peut être necessaire pour la défense du vaisseau et de l'équipage. Tous les autres articles quelconques non designées ici ne seront pas réputés munitions de guerre et navales, ni sujets à confiscation, et par consequent, autant qu'ils ne pourront pas être considerés comme propriétés ennemies ils passeront librement. . . ."

The article reserves the case of England under the treaty of 1805.

In a treaty made in London between Great Britain and the United States, in 1806,[1] Article IX provides:—

"In order to regulate what is in future to be esteemed contraband of war, it is agreed that under the said denomination shall be comprised all arms and implements serving for the purposes of war by land or by sea, such as cannon, muskets, mortars, petards, bombs, grenades, carcasses, saucisses, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war; as also timber for shipbuilding, copper in sheets, sailcloth, hemp and cordage, and in general (with the exception of unwrought iron and fir planks, and also with the exception of tar and pitch, when not going to a port of naval equipment, in which case they shall be entitled to preemption) whatever may serve directly to the equipment of vessels, and all the above objects are declared to be just objects of confiscation whenever they are attempted to be carried to an enemy, but no vessel shall be detained on pretence of carrying contraband of war unless some of the above-mentioned articles not excepted are found on board of the said vessel at the time it is searched."

The exception of "unwrought iron and fir planks" is believed to be new. And Lord Stowell's criterion of the contraband character of articles *ancipitis usus*—viz. the port of destination—is incorporated as the test of the nature of pitch and tar. That such was the criterion adopted by him is denied by Wheaton (sec. 489); but the case on which Wheaton relies merely decides that manufactured spars are absolute contraband, not that they may be contraband in certain cases, although not destined for a military or naval port.[2]

By a treaty between Great Britain and Portugal, made at Rio de Janeiro in 1809,[3] Article XXXV declares contraband:—

"Debaixo da denominação de contrabando de guerra ou generos prohibidos se comprehenderão armas, peças de artilheria arcabuzes, morteiros, petardos, bombas, granadas, salchichas, carcassas, carretas de peças, arrimos

[1] State Papers, Vol. I, part ii, p. 1194.
[2] The *Charlotte*, 5 Rob., 305. *Vide infra*, p. 77.
[3] Calvo, "Traités de l'Amerique Latine," Vol. V, p. 162. See also Hertslet's "Treaties," Vol. II, p. 26.

de mosquetes bandoleiras, polvora, mechas, salitre, balas, piques, espadas, capacetes, elmos, couraças, alabardas, azagayas, coldres, boldriés cavallos e arreios e geralmente todos os demais generos que possam têr sido especificados como contrabando em qualquer Tratado precedente concluido por Portugal ou pela Gran-Bretanha com outras potencias. Mas generos que não tenham sido fabricados em fórma de instrumentos de guerra ou que não possam vir a sê-lo, não devems ser reputados contrabando muito menos aquelles que ja estao fabricados para outros fins, os quaes todos devem ser reputados contrabando e poderão ser levados livremente pelos vassallos de ambos os soberanos, mesmo a logares pertencentes a um inimigo á excepção sómente d'aquelles logares que estão sitiados bloqueados ou accommettidos por mar ou por terra."

Article XXVIII of a treaty between the same powers made at Rio de Janeiro, 1810, provided :—

"Under the name of contraband or prohibited articles shall be comprehended not only arms [here follows list of weapons and armour], gunpowder, match, saltpetre, horses and their harness, but generally all other articles that may have been specified as contraband in any former treaties concluded by Great Britain or by Portugal with other Powers. But goods which have not been wrought into the form of warlike instruments, or which cannot become such, shall not be reputed contraband, much less such as have been already wrought and made up for other purposes, all of which shall be deemed not contraband, and may be freely carried by the subjects of both sovereigns, even to places belonging to an enemy, except only such places as are besieged, blockaded, or invested by sea or land."

By Article XXI of a treaty between Denmark and Prussia, made at Copenhagen in 1818,[1] it is provided :—

"Sous la denomination de marchandise de contrebande militaire sont comprises seulement les armes à feu et autres instruments hostiles avec leurs assortimens comme canons, mousquets, mortiers, pétards, bombes, grenades, affûts, fusils, pistolets, boulets, balles, pierres à feu, mèches, poudre, salpêtre, souffre, cuirasses, piques, epées, ceinturons, poches à cartouches, selles et brides, en exceptant toutefois de ces effets ce qui est necessaire pour la défense du vaisseau et de son équipage, ces marchandises ne seront réputés contrebande militaire que dans les cas qu'on les porte dans quelque pays ennemi. Toutes les autres marchandises qui ne sont point indiquées dans cet article ne peuvent pas être considérés comme contrebande militaire."

In a treaty between the United States and the Confederation of Central America in 1825,[2] Article XVI provides :—

"This liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the

[1] State Papers, Vol. V, p. 695.
[2] Martens, N.R., Vol. VI, p. 826.

name of contraband, and under this name of contraband or prohibited goods shall be comprehended :—

"(1) Cannon, mortars, howitzers, swivels, blunderbuses, muskets, fuzees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

"(2) Bucklers, helmets, breastplates, coats of mail, infantry belts, and clothes made up in the form for a military use.

"(3) Cavalry belts and horses, with their furniture.

"(4) And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared, and formed expressly to make war by sea or land.

"Article XVII. All other merchandise and things not comprehended in the articles of contraband explicitly enumerated and classified as above, shall be held and considered as free and subjects of free and lawful commerce so that they may be carried and transported in the freest manner by both the contracting parties even to places belonging to an enemy, excepting those places which are at that time besieged or blockaded; and to avoid all doubts in this particular, it is declared that those places only are besieged and blockaded which are actually attacked by a belligerent force capable of preventing the entry of neutrals."

This treaty is remarkable as containing the first express mention of military clothes or uniforms as contraband.

By a treaty made between France and Brazil at Rio Janeiro[1] in 1826, Article XXI provides :—

"S'il arrivoit que l'une des hautes parties contractantes soit en guerre avec quelque puissance, nation ou état, les sujets de l'autre pourront continuer leur commerce et navigation avec ces mêmes états excepté avec les villes ou ports qui seroient bloqués ou assiéges par terre ou par mer. Mais dans aucun cas ne sera permis le commerce des articles réputés contrebande de guerre qui sont les suivans : canons, mortiers, fusils, pistolets, grenades, saucisses, affûts, baudriers, poudre, salpêtre, casques, balles, piques, epées, hallebardes, selles, harnois, et autre instrumens quelconques fabriqués à l'usage de la guerre."

France appears from this treaty to have accepted the Russian principle of narrowly limiting the list.

A treaty made at Rio Janeiro between Prussia and Brazil in 1827[2] contains (Article VI) precisely the same provisions as to contraband as those contained in the treaty between France and Brazil made the preceding year.[3]

In a treaty made between Great Britain and Brazil at London in 1827,[4] Article XV provides :—

"In order to regulate what is in future to be deemed contraband of war, it is agreed that under the said denomination shall be comprised all

[1] Martens, N.R., Vol. VI, p. 868.
[2] *Ibid.*, Vol. VII, p. 470.
[3] *Vide supra.*
[4] Martens, N.R., Vol. VII, p. 479.

arms and implements serving for the purposes of war by land or by sea, such as cannon, muskets, pistols, mortars, petards, carriages for cannon, musket rests, bandoliers, gunpowder, match, saltpetre, ball, pikes, swords, headpieces, cuirasses, halberts, lances, javelins, horse furniture, holsters, belts, and generally all other implements of war; as also timber for shipbuilding, tar or resin, copper in sheets, sails, hemp and cordage, and generally whatsoever may serve directly to the equipment of vessels of war, unwrought iron and fir planks excepted; and all the above articles are hereby declared to be just objects of confiscation whenever they are attempted to be carried to an enemy."

This follows the lines of the treaty of Great Britain of 1806 with the U.S.A.

In a treaty between Denmark and Brazil, made at Rio Janeiro in 1828,[1] Article X provides as follows:—

"S'il arrivoit que l'une des hautes parties contractantes entroit en guerre contre quelque puissance, nation ou état, les sujets de l'autre partie pourront continuer leur commerce avec ces états en exceptant néanmoins les villes et ports qui seroient bloqués ou assiégés par mer ou par terre. Mais le commerce de la contrebande de guerre ne pourra se faire en aucun port quelconque.

"Sous la dénomination des marchandises de contrebande de guerre sont compris: les canons, mortiers, fusils, pistolets, grénades, saucisses, voitures, ceinturons, poudres, salpêtre, casques, balles, boulets, javelines, epées, hallebardes, selles et harnais ou autres instrumens quelconques déstinés à l'usage de la guerre."

This resembles the Prussian and French treaties of 1826 and 1827.

In a treaty made at Mexico in 1831 between the United States of America and the United States of Mexico,[2] Article XVIII is as follows:—

"This liberty of commerce and navigation shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband, and under this name of contraband or prohibited goods shall be comprehended: first, cannons, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberts and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms; secondly, bucklers, helmets, breastplates, coats of mail, infantry belts and clothes made up in a military form and for a military use; thirdly, cavalry belts and horses with their furniture; fourthly, and generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other material manufactured, prepared, and formed expressly to make war by sea or land.

"Article XIX. All other merchandise and things not comprehended in the articles of contraband expressly enumerated and classified as

[1] *Ibid.*, Vol. VII, p. 608.
[2] *Ibid.*, Vol. X, p. 323.

above, shall be held and considered as free and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded; and to avoid all doubt in that particular, it is declared that those places only are besieged and blockaded which are actually besieged or blockaded by a belligerent force capable of preventing the entry of the neutral."

This is exactly on the lines of the treaty with Central America of 1825.

In a treaty made between the Hanse Towns and Mexico at London, 1832,[1] Article XI provides:—

"* * * In case that one of the contracting parties should find itself in a state of war, whilst the other remains neutral, it is agreed that all which the belligerent party may have stipulated with the other powers for the advantage of the neutral flag shall serve as a rule between Mexico and the Hanse Towns. In order that there may be no misunderstanding as to what should be considered contraband military articles, it is agreed (without prejudice, however, to the general principle above mentioned) to limit the definition to the following articles: cannons, mortars, guns, pistols, grenades, saucisses, gun carriages, belts, powder, saltpetre, helmets, ball, pikes, swords, halberds, saddles, harness, and other articles manufactured for the use of war."

This is unlike the United States treaties, in not including uniforms and horses, and in entering into less particularity of detail. The Hanse Towns also (as in their treaty with Guatemala)[2] insert a provision conferring on the neutral the advantages of the most favoured nation—apparently the inverse of the provision in the Portuguese-British treaty of 1809, conferring a similar privilege on the belligerent.

In a treaty made between the United States of America and Chili, made at Santiago in 1833,[3] Articles XIV and XV make precisely the same provisions as to contraband as those contained in the treaty between the United States and Mexico, made in 1831.[4]

A treaty between the United States and Venezuela, made at Caracas in 1836,[5] is also identical as to contraband with the U.S. treaties with Chili and Mexico.

In a treaty made at Guatemala, 1847, between the Hanse Towns and Guatemala,[6] Article XVII provides:—

"In case one of the two contracting parties should be at war while the other remains neutral, it is agreed that whatever the belligerent party may

[1] State Papers, Vol. XXIII, p. 1016.
[2] *Infra.*
[3] State Papers, Vol. XXII, p. 1353.
[4] *Vide supra*, p. 35.
[5] State Papers, Vol. XXIV, p. 746.
[6] *Ibid.*, Vol. XL, p. 1363.

have stipulated or shall stipulate in favour of the neutral flag with other Powers shall also serve as the rule between the republic of Guatemala and the Hanseatic Republics. And in order to avoid any doubt as to what is to be considered as contraband of war, it is agreed (saving the general principle expressed above) to restrict the definition thereof to the following articles:—

"(1) Cannon, mortars, howitzers, patereros, blunderbusses, muskets, firelocks, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds, grenades, shells, gunpowder, matches, balls, and all other things necessary for the use of these arms.

"(2) Shields, helmets, cuirasses, coats of mail, trappings, and garments made in military fashion and for military use.

"(3) Belts and horses, together with their arms and harness.

"(4) And finally all kinds of arms, and instruments of iron, steel, bronze, copper, and any other materials manufactured, prepared, and intended expressly for carrying on war by sea or land."

In a treaty made between the United States and Guatemala in 1849,[1] Article XVI is as follows:—

"This liberty of navigation and commerce shall extend to all kinds of merchandise excepting only those which are distinguished by the name of contraband, and under the name of contraband or prohibited goods shall be comprehended:—

"(1) Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds, and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

"(2) Bucklers, helmets, breastplates, coats of mail, infantry belts, and clothes made up in the form and for a military use.

"(3) Cavalry belts, and horses with their furniture.

"(4) And generally all kinds of arms and instruments of iron, steel, brass, and copper, or any other materials manufactured, prepared, and formed expressly to make war by land or sea.

"Article XVII. All other merchandise and things not comprehended in the articles of contraband explicitly enumerated and classified as above shall be held and considered as free and subjects of free and lawful commerce, so that they may be carried in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded, which are actually attacked by a belligerent force capable of preventing the entry of the neutral."

This is the common form of treaties of the United States of America.

A treaty made at Lima between the United States and Peru, in 1852,[2] contains in Articles XXIII and XXIV the same pro-

[1] *Ibid.*, Vol. XXXIX, p. 51.
[2] *Ibid.*, Vol. XL, p. 1095.

visions as those contained in the treaty above cited between the United States and Guatemala.

In 1854 a remarkable joint declaration was issued by France and England, declaring their desire to render the results of the war they were then about to enter upon with Russia as little onerous as possible to neutral Powers, and the policy pursued by France and England in respect of contraband was followed by Russia.

During the Crimean War contraband was strictly confined by the principal belligerents to arms and munitions of war. The course adopted by Russia in 1854 was pursued by her during her war in 1877[1] with Turkey, and her declaration as to what articles should constitute contraband was strictly confined to arms, military and naval equipment and munitions, troops, correspondence and despatches of the enemy.

By a proclamation of the Senate of Lubeck made in 1854:—[2]

"Arms, ordnance, firearms, and munitions of war of every description, gunpowder, musket and cannon balls, rockets and percussion caps and all other articles serving for war purposes, saltpetre, sulphur, and lead, are declared contraband of war."

By Article V of an ordinance of Sweden promulgated in 1854,[3] the following are declared contraband of war:—

"Cannons, mortars, all kinds of arms, bombs, grenades, balls, flints, linstocks, gunpowder, saltpetre, sulphur, cuirasses, pikes, belts, cartouch boxes, saddles, bridles, and all other manufactures immediately applicable to warlike purposes."

By an ordinance of the Government of Sweden made in 1855,[4] lead, whether raw or manufactured, was included among articles of contraband of war.

By the Declaration of Paris made in 1856 by Great Britain, Austria, France, Prussia, Sardinia, and Turkey,[5] it was declared:—

(1) "La course est et demeure abolie.

(2) "Le pavillon neutre couvre la marchandise ennemie à l'exception de la contrebande de guerre.

(3) "La marchandise neutre à l'exception de contrebande de guerre n'est pas saisissable sous pavillon ennemi.

(4) "Les blocus pour être obligatoires doivent être effectifs, c'est à dire maintenus par une force suffisante pour interdire réellement l'accès du littoral de l'ennemi."

[1] *Infra*, p. 43.
[2] State Papers, Vol. XLV, p. 1271.
[3] *Ibid.*, Vol. XLVI, p. 833.
[4] *Ibid.*, Vol. LXVIII, p. 489.
[5] Samwer, "Recueil des Traités," Vol. II, first series, p. 768.

A treaty made at Paris between France and Honduras in 1856[1] (Article XVIII) provides:—

"Dans le cas où l'un des deux pays serait en guerre avec quelque autre puissance, les citoyens de l'autre pays pourront continuer leur commerce avec les états belligerants quels qu'ils soient, excepté avec les villes ou ports qui seraient réellement assiégés ou bloqués. Il est également entendu qu'on n'envisagera comme assiegées ou bloquées que les places qui se trouveraient attaquées par une force belligérante capable d'empêcher les neutres d'entrer. Bien entendu que cette liberté de commerce et de navigation ne s'etend pas aux articles reputés contrebande de guerre, tels que bouches et armes à feu, armes blanches, projectiles, poudres, salpêtre, objets d'equipements militaires et généralement toute espèce d'armes et d'instruments de fer, acier, cuivre ou de toute autre matière expressément fabriqués pour faire la guerre par terre ou par mer."

A treaty between France and Nicaragua made at Paris in in 1859 contains identical provisions.[2]

By a proclamation of the Queen of England made in 1861[3] on the occasion of the war between the United States and the Confederate States of America, it is declared:—

"Par les présentes nous enjoignons et commandons à tous nos bien-aimés sujets d'observer une stricte neutralité durant les hostilités précitées, et de s'abstenir de violer ou enfreindre soit les lois et les statuts du royaume, soit le droit des gens, ou que par là ils en prendraient la responsabilité à leurs risques et périls."

The proclamation goes on to forbid the Queen's subjects from carrying to either belligerent:—

"Officiers, soldats, dépêches, armes, munitions, matériel de guerre ou tout autre article consideré comme contrebande de guerre par les lois et les usages des nations modernes."

In the American Civil War the Government of the United States declared the following contraband:—[4]

"Gold and silver coin, cheques or bills of exchange for money, articles of food, clothing, and material for the manufacture of clothing, rifle, pistol, musket and cannon balls and shells, gunpowder and all materials used in its manufacture, ammunition and munitions and implements of war of every description, books of military education, saddles, harness, and trappings for flying artillery, field and staff officers and cavalry troops, horses, gun carriages, timber for shipbuilding, all kinds of naval stores, engines, boilers, and machinery for boats, locomotive engines and cars for railroads, and goods and commodities which might be useful to the enemy in war."

[1] De Clercq, Vol. VII, p. 10.
[2] Samwer, "Recueil des Traités," Vol. III, part 2, p. 185.
[3] "Archives Diplomatiques," 1861, Vol. II, p. 375. (Trans.)
[4] State Papers, Vol. LI, p. 198.

This is a most sweeping list, including in absolute terms both naval stores and provisions, and mentioning (apparently for the first time) engines, boilers, and machinery for boats, locomotive engines and cars for railways (but not rails or sleepers). The final inclusion of everything which "might be useful," whether specially useful in war or not, is undoubtedly too broad.

In 1861 Messrs. Slidell and Mason, envoys from the Confederate States to Great Britain, were proceeding for the purposes of their mission in a British-built steamer, and when on the high seas the steamer was stopped by a war vessel of the United States, and was boarded by an armed party therefrom, who forcibly removed the two envoys. The United States, by a despatch of their Foreign Secretary to the English Government, insisted that these persons were contraband of war; the British Government, on the other hand, concluded that the distinction of the persons and the despatches they carried were neutral, and they quoted Lord Stowell's observation: "Goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. The rule respecting contraband, as I have always understood it, is that articles must be taken *in delicto* in the actual prosecution of the voyage to an enemy's port."[1]

The view of Great Britain as to the true doctrine of contraband is contained in a despatch of Earl Russell to Lord Lyons in 1862.[2]

"The doctrine of contraband has its whole foundation and origin in the principle which is nowhere more accurately explained than in the following passage of Bynkershoek. After stating in general terms the duty of impartial neutrality: 'Et sane id, quod modo dicebam, non tantum ratio docet, sed et usus, inter omnes fere gentes acceptus. Quamvis enim libera sint cum amicorum nostrorum hostibus commercia usu tamen placuit ne alterutrum his rebus juvemus quibus bellum contra amicos nostros instruatur et foveatur. Non licet igitur alterutri advehere ea quibus in bello gerendo opus habet; ut sunt tormenta, arma, et quorum præcipuus in bello usus, milites. Optimo jure interdictum est ne quid eorum hostibus subministramus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere'" (Quaest. Jur. Publ. l. i. c. 9).

By the regulations of the Prussian Government, made in 1864,[3] but not formally adopted by the German Empire, the following are declared contraband of war:—

"Cannons, mortars, every kind of arms, bombs, grenades, bullets, caps, slow matches, gunpowder, cuirasses, war equipment, saddles, bridles, and in general all objects which are directly of use in war."

[1] *The Imina*, 3 Rob, 167.
[2] State Papers, Vol. LV, p. 653.
[3] *Ibid.*, Vol. XCIV, p. 1009.

This is a notable return to sober doctrine on the subject, in strong contrast to the United States declaration of 1861.

By a proclamation issued in 1864 by the Governor of Canada, the following definition of contraband appears :—

"Arms, ammunition and gunpowder, and military and naval stores, and any articles which our Governor in Council shall judge capable of being converted into or being made useful in increasing the quantity of military or naval stores."

By Article XII of a proclamation by Denmark, made at Copenhagen in 1864,[1] contraband is defined as follows :—

"Seront regardés comme contrebande les articles qui suivent, savoir: Canons, mortiers, espingoles, toutes espèces d'armes, bombes, grenades, balles et boulets, capsules, mèches, poudre, salpêtre, soufre, cuirasses, objets d'armement et d'équipement militaire, selles et mors et en général tous les objets propres à être employés dans la guerre, sauf les provisions des articles sus-mentionnés necessaires à la defense du navire ou de son équipage, dans la supposition toutefois que ces objets sont destinés pour un port ennemi."

In an ordinance of Austria made in 1864[2] Article VII declares contraband as follows :—

"Sont déclarés objets de contrebande les effets ci-après, mais seulement quand ils sont à destination de ports ennemis : les canons, obusiers, pierriers, armes de toute espèce, bombes, grenades, boulets, mèches, capsules, poudre, salpêtre, souffre, cuirasses, objets d'équipement, selles et brides, en général tous les articles pouvant servir immédiatement aux usages de la guerre, à l'exception des approvisionnements nécessaires à la défense de l'équipage ou du navire et appropriés à cette fin."

A treaty made between the United States of America and Hayti in 1864[3] contains in Articles XX and XXI the same provisions as to contraband as those contained in the treaties between the United States, Guatemala, and Peru above cited.

By a proclamation of the President of the United States removing restrictions on trade in certain parts of the Republic, except in articles contraband of war, made at Washington, 1865, contraband of war was defined as follows :—

"Arms, ammunition, all articles from which ammunition is made, and gray uniforms and clothes."

By a declaration in 1866 of the Spanish Commander-in-Chief,

[1] "Archives Diplomatiques," 1864, Vol. II, p. 118.
[2] *Ibid.*, 1864, Vol. II, p. 131.
[3] *Ibid.*, 1866, Vol. I, p. 5.

Chilian coal was included as contraband of war, whatever might be the port of destination or ships carrying it:—

"Article III. This declaration, confined as it is to a special case and peculiar to the present war, is not intended to establish any precedent with respect to the general principle that coal should not be considered contraband of war."

By a decree of the Peruvian Government in 1866, coal and provisions were declared contraband of war if destined for the use of Spanish ships of war.

In a treaty between the Argentine Republic and Peru made at Buenos Ayres in 1874,[1] Article XXI provides:—

"The following articles shall be considered as contraband of war, the transport of which and the trade in which shall be prohibited in time of war:—

"(1) Pieces of artillery in all classes and calibres, the carriage and utensils for their employment and projectiles, powder, bombs, torpedoes, greek fire, congreve rockets, and other things destined for artillery and musketry.

"(2) Shields, helmets, cuirasses, coats of mail, military equipments, and uniforms.

"(3) Cavalry cartridges, belts, and horses with their harness.

"(4) Steam engines, fuel and appliances intended for the use of vessels of war, and in general every kind of weapon of iron, steel, copper, bronze, and any other manufactured materials prepared or formed expressly for military or naval hostilities.

"(5) Victuals destined for hostile troops or fleets."

Here, not perhaps for the first time, but in the most formal manner, the subjective feature of "intention" is brought in as a factor in the problem of ascertaining whether goods are contraband or not. Naval stores (other than raw materials) and provisions are declared contraband *sub modo*. Unlike the British rule, which provided an objective test—destination to a naval port—the rule of the treaty above makes the question of intention the governing criterion: which is clearly of much inferior value as a protection to the neutral.

The legislative body of the Dominican Republic, by a law passed in 1876,[2] declared the following contraband of war:—

"Guns, rifles, muskets, and cartridges of whatever system, revolvers, shots and caps which are not for fowling pieces."

By a decree of the Guatemala Government[3] during the war

[1] State Papers, Vol. LXIX, p. 701.
[2] *Ibid.*, Vol. LXVIII, p. 663.
[3] *Ibid.*, Vol. LXVII, p. 973.

between Guatemala and Salvador the following articles were declared contraband of war:—

"Arms of every kind, gunpowder and the materials used for its manufacture, munitions of war and materials for their manufacture, and soldiers' clothing."

By a proclamation made at Windsor in 1877,[1] British subjects were enjoined not to carry for the use of the belligerents (Russia and Turkey)—

"Officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, on the penalty of being liable to hostile capture."

By a decree of the Government of Russia made in 1877,[2] during the war between Russia and Turkey, the following provisions as to contraband were made:—

"Article VI. Sont réputés contrebande de guerre les objets suivants:—

"Les armes portative et d'artillerie, montées ou en pièces détachées; les munitions d'armes à feu telles que projectiles, fusées d'obus, balles, amorces, cartouches, tubes de cartouches, poudre, salpêtre, soufre; le matériel et les munitions de pièces explosibles telles que mines, torpilles, dynamite, pyroniline et autres substances fulminantes; le matériel de l'artillerie, du génie et du train, tels que affuts, caissons, caisses de cartouches, forges de campagne, cantines, pontons, etc., les objets d'équipement et d'habillement militaire, tels que gibernes, cartouchières, sacs, cuirasses, outils de sape, tambours, selles et harnais, pièces d'habillement militaire, tentes etc., et en général tous les objets destinés aux troupes de terre ou de mer."

"Ces objets, lorsqu'ils sont trouvés à bord de navires neutres et destinés à un port ennemi peuvent être saisis et confisqués, sauf la quantité qui est necessaire au navire sur lequel est opérée la saisie.

"Article VII. Sont assimilés à la contrebande de guerre les actes suivants interdits aux neutres: le transport de troupes ennemis celui de dépêches et de la correspondance de l'ennemi, la fourniture de navires de guerre à l'ennemi."

This is a remarkable document, signalizing a complete change of front on the part of Russia, and forming a new departure in the theory of contraband. Passing by the particularization of modern explosives and weapons, which was scarcely to be deprecated, we notice that it includes generally "tous les objets destinés aux troupes." This is really (unless "destinés" means "specially adapted for") to bring in by implication the doctrine of Intention: and to make anything confiscable which the captor

[1] *Ibid.*, Vol. LXVIII, p. 863.
[2] *Ibid.*, Vol. LXVIII, p. 924.

can make out to be intended for the service of the belligerent forces, without regard to its specially aggressive nature. It is apparent, on even a cursory reading of the old lists, that they never contemplated any such wide scope of the idea of contraband. Camp-kettles, maps, carts, spades—to give only a few instances—are quite out of the range of what they include. The new doctrine may perhaps be traced to the United States treaties including uniforms. The old lists included coats of mail because they had a fighting value. The United States began to include clothes because they were meant for soldiers.

Here Russia still refrains from expressly including horses.

A notification was issued by the British Foreign Office in 1877, during the Russo-Turkish war,[1] that to ships clearing from ports in the United Kingdom with coals for Port Said on production of shipping documents proving that the coal was intended for commercial use, certificates of protection against seizure by Russian cruisers would be issued by the Russian Consul-General.

In a proclamation of the Government of Denmark, made during the Russo-Turkish war in 1877,[2] in addition to articles declared contraband by the Ordinance of 1803,[3] Article VII declares that—

"All such manufactured articles as could be directly used in warfare"

shall be contraband.

By a proclamation of the Khedive of Egypt made in 1882,[4] during the rebellion in that country, the importation of munitions of war and coal was forbidden on the littoral of the seat of war.

In 1885, during the course of a war between France and China, the French Government intimated their intention to treat rice destined for Chinese ports to the north of Canton as contraband of war. Lord Granville, in a letter[5] to the French Ambassador of 27 February, 1885, has stated his views upon that intention:—

"I regret to have to inform you that H.M.'s Government feel compelled to take exception to the proposed measure, as they cannot admit that, consistently with the law and practice of nations and with the rights of neutrals, provisions in general can be treated as contraband of war. Her Majesty's Government do not contest that under particular circumstances provisions may acquire that character, as, for instance, if they should be consigned direct to the fleet of a belligerent or to a port where such fleet may be lying, and facts should exist raising the presumption that

[1] State Papers, Vol. LXVIII, p. 930.
[2] *Ibid.*, Vol. LXVIII, p. 614.
[3] *Ibid.*, Vol. XLVIII, p. 305, and *supra*, p. 43.
[4] *Ibid.*, Vol. LXXIV, p. 577.
[5] *Ibid.*, Vol. LXXVI, p. 437.

they were about to be employed in victualling the fleet of the enemy. In such case it is not denied that the belligerent would be entitled to seize the provisions as contraband of war on the ground that they would enable warlike operations to be carried on.

"But H.M.'s Government cannot admit that if such provision were consigned to the port of a belligerent (even though it should be a port of naval equipment) they could therefore be necessarily regarded as contraband of war.

"In the view of H.M.'s Government, the test appears to be whether there are circumstances relative to any particular cargo or its destination to displace the presumption that articles of this kind are intended for the ordinary use of life, and to show, prima facie at all events, that they are destined for military use."

In reply to the above despatch, the French Ambassador quoted a statement of the Att.-Gen. (Collier) in the House of Commons to the effect that contraband might be classified as follows: (1) Articles that serve directly for the purposes of war, such as arms and munition. (2) Articles that may serve indirectly for the purposes of war, namely, in prolonging hostilities, such as provisions; and roundly asserted the doctrine that it is for belligerents to decide what is and what is not contraband of war. He adds:—

"L'importance du riz dans l'alimentation des populations et des armées Chinoises ne permettait pas à mon Gouvernement d'en autoriser le transport dans le Nord de la Chine sous peine de se priver d'un des procédés du coercition les plus puissants qui soient à sa disposition . . . et il a pensé qu'en l'état du droit des gens sur la matière, rien ne lui interdisait d'arriver au double but qu'il poursuit; mettre le plus tôt possible l'ennemi dans l'impossibilité de continuer la lutte et ménager autant que possible l'interêt des neutres en déclarant que le riz serait traité par la France comme un article de contrebande de guerre."

The reply of Lord Granville to this despatch stated that the British Government

"do not contest the general correctness of the view taken by the Government of the Republic to the effect that it is for the Prize Court to decide, in the first instance, on the legality of the seizure, but any such decision to be binding on neutral Governments must be in accordance with the rules and principles of international law; but H.M.'s Government feel themselves bound to reserve their rights by protesting at once against the doctrine that it is for the belligerent to decide what is and what is not contraband of war regardless of the well-established rights of neutrals."

He goes on to advert to a further contention of the French Government that this rice was intended to be applied as a tribute or subsidy to the Court of Pekin, and was therefore liable to seizure as contraband, and proceeds:—

"I think it right to observe, in order to prevent any misapprehension,

that the seizure of such shipments under a neutral flag would be inconsistent with the Declaration of Paris, which provides that the neutral flag covers enemy's goods except contraband of war, and that H.M.'s Government adhere in all respects to the views expressed in my Note of the 27th February last, protesting against rice being treated generally as contraband of war, and that they will not consider themselves bound by the decision of any Prize Court which should uphold a contrary opinion."

By a decree of the Government of Spain made in 1898[1] the following were declared contraband of war :—

"Cannons, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridges, matches, powder, sulphur, saltpetre, dynamite, and every kind of explosive, articles of equipment, like uniform, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers, and other articles used in the construction, repair, and arming of warships, and, in general, all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband."

By the instructions of the Admiralty Council of Russia, issued September, 1900,[2] the following articles are declared contraband of war :—

"(*a*) All kinds of arms, small arms, and guns, both put together and in parts.

"(*b*) Articles and stores required for shooting with firearms, such as projectiles for guns, fuses for projectiles, bullets, caps, cartridges, cartridge cases, powder, nitre, sulphur.

"(*c*) Objects or substances used for causing explosions, such as torpedoes and mines, dynamite, pyroxyline, and other explosive compounds.

"(*d*) Articles belonging to artillery, engineer, and army train, such as gun carriages, mountings, cartridge and ammunition chests or packs, field smithies, field kitchens, instrument carts, pontoons, bridge trestles, train harness, etc.

"(*e*) Articles of army equipment and clothing, such as wallets, cartridge boxes, haversacks, bandoliers, cuirasses, entrenching tools, drums, cooking kettles, saddles, horses' harness, finished articles of uniform, tents, etc.

"(*f*) Sea-going vessels bound for an enemy's port, even under a neutral merchant flag, if from the construction of their hulls, their internal arrangements, and other evidences, it is clear they are constructed for warlike purposes, and are going to the enemy's port for sale or delivery to the enemy.

"(*g*) In general, all other articles directly intended for war on land or sea, if they are being conveyed on behalf of, or are destined for, the enemy.

[1] State Papers, Vol. XC, p. 159.

[2] See "Regulations in regard to Naval Prizes," issued by the Printing Department of the Russian Ministry of Marine, 1901 ; *ibid.*, Vol. XCIV, 896.

"By the expression 'destined for the enemy' is understood conveying to his fleet, to one of his ports, or even to a neutral port, if the latter is shown by clear and indisputable evidence to be simply an intermediate station on the way to the enemy, the latter being really the ultimate destination.

"The following acts are considered to be on the same footing as contraband of war, with the same consequences for a neutral vessel or cargo:—

"(1) The transport of enemy's troops, military detachments, and individual soldiers; and

"(2) The conveyance of enemy's despatches, i.e. business correspondence between enemy's chiefs and their agents who are on a ship or on territory belonging to or occupied by the enemy."

By a notification published at Tokio 10 February, 1904,[1] the Japanese Government declared the following contraband of war. The list of contraband is divided into two classes, the first class being absolutely contraband; the second class conditionally contraband:—

"First class. Military weapons, ammunition, explosives, and materials, including lead, saltpetre, sulphur, etc., and machinery for making them; uniforms, naval and military, military accoutrements, armour-plated machinery and materials for construction or equipment of ships of war, and all other goods which, though not coming under this list, are intended solely for use in war. Above-mentioned articles will be regarded as contraband of war when passing through or destined for enemy's use.

"Second class. Provisions, drinks, horses, harness, fodder, vehicles, coal, timber, coins, gold and silver bullion, and materials for construction of telegraphs, telephones, railways. Above-mentioned articles will be regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy."

The following order as to contraband of war was issued by the Russian Government in February, 1904, for the purpose of the Japanese war:—[2]

"The following articles are deemed to be contraband of war:—

"(1) Small arms of every kind, and guns mounted or in sections, as well as armour plates.

"(2) Ammunition for firearms, such as projectiles, shell fuses, bullets, priming, cartridges, cartridge cases, powder, saltpetre, sulphur.

"(3) Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes.

"(4) Artillery, engineering and camp equipment, such as gun carriages, ammunition waggons, boxes or packages of cartridges, field kitchens

[1] "London Gazette," 19 February, 1904.
[2] *Ibid.*, 11 March, 1904.

and forges, instrument waggons, pontoons, bridge trestles, barbed wire, harness, etc.

"(5) Articles of military equipment and clothing, such as bandoliers, cartridge boxes, knapsacks, straps, cuirasses, entrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, etc.

"(6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications, that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy.

"(7) Boilers and every kind of naval machinery, mounted or unmounted.

"(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials.

"(9) Articles and materials for the installation of telegraphs, telephones, or for the construction of railroads.

"(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burthen and others which may be used for a warlike purpose if they are transported for the account of, or are destined for, the enemy."

In the March following this order instructions were issued to commanders of warships for the inclusion in articles contraband of—

"All kinds of grain, fish, fish products, beans, bean oil, and oil cakes. To list of remaining articles intended for war are added machinery and parts thereof intended for the manufacture of cannons, small arms, and projectiles."[1]

On the $\frac{8}{21}$ April, 1904, the Russian Government issued an order including raw cotton in the list of articles declared contraband of war.[2]

It will be observed that there is not even a requirement that the articles susceptible of a possible warlike use should be proved to be intended for the belligerent army or navy. The words seem simply to require a transport "pour le compte ou à destination de l'ennemi."[3] They do not appear to imply that they must be shipped on account of, or be destined for, the enemy Government. But the Supreme Tribunal at St. Petersburg (*vide* the "Calchas," *infra*, p. 87) informs us, what we should not otherwise have suspected, that "*ennemi*" means the enemy "Government, contractors, army, navy, fortresses or naval harbours, and not for private individuals." So interpreted, the code supplies rather a good rule for the ascertainment of the contraband

[1] "London Gazette," 22 March, 1904. (Telegraphic summary.)

[2] See "London Gazette," 31 May, 1904.

[3] Clunet, "Journ. de Droit Int. Privé," Vol. XXXI, p. 478. A different version (*ibid.*, Vol. XXXII, p. 479) says, "aux frais *ou à l'ordre* de l'ennemi."

character of prima facie innocent goods—a rule perfectly consistent with the old principles of maritime law, which would have condemned goods so consigned as enemy property. In such cases, as the Court correctly remark, the onus of proof lies on the claimant to show the nature of the ownership.

If such a rule be adopted, it minimizes very much the importance of the controversy as to the true test of "occasional" contraband.

It cannot be doubted, however, that on these principles the Russian Court went a great deal too far in ordering the condemnation of the cotton on board the "Calchas." The sole suggestion of a governmental interest in the property was derived from the fact that the cotton was going to Kobe, and that there was a military arsenal at Osaka. This was scarcely a case for condemnation, or even of such definite suspicion as to warrant calling on the claimants for further proof. Further proof seems to have been allowed and none tendered. But it should not have been required.[1] Other part of the cargo consisted of logs, and was confiscated under the sweeping words "articles and materials for the installation of telegraphs, telephones, or for the construction of railroads."[2] It is absurd to treat rough logs as being necessarily materials for telegraph or railway plant. Our Admiralty Court never condemned rough timber, even when it was pretty clear that it would be used for shipbuilding.

The table on pp. 54, 55 sets out the attitude manifested in their treaties by the principal maritime Powers in relation to the controversial point as to whether horses, money, ships, naval stores, provisions, and troops were to be regarded as contraband. With regard to horses, though in some few treaties they are not specifically mentioned, the uniform practice of the principal Powers other than Russia—which, however, on the outbreak of hostilities with Japan in 1904 for the first time included them in the list of articles contraband—from the early part of the seventeenth century down to the present time, has been to classify them as contraband.

We find that during the seventeenth century money or bullion was, in four treaties to which Great Britain was a party, declared contraband, and in two expressly excluded. During the eighteenth century it was never expressly included in any of her treaties, and in two, with France, it was expressly excluded. In the nineteenth century, viz. in a treaty with Sweden, and again in 1861 in a treaty with the United States, it was expressly included, and in all other treaties to which she was a party, not mentioned.

[1] See on the case further, p. 87, *infra*.
[2] Art. IX, *supra*.

France in her treaties has never included bullion or money as contraband; but in four treaties, three of which were with Great Britain and one with the United States, money was expressly excluded. Of the other Powers, Sweden three times in treaties with Great Britain, Spain once in 1604, and Holland once in 1654, expressly included money. In the treaties of other countries we find no mention of money or bullion.

Subject to the following exceptions, the practice of all nations seems to have been to exclude ships from the category of contraband within their treaties. The noticeable exceptions were in the seventeenth century in the case of two treaties between Great Britain and Holland, and three treaties between Great Britain and Sweden. In a treaty made in 1803 between Great Britain and Sweden ships are expressly mentioned as being contraband.

In 1625, Great Britain in a treaty with Holland expressly included naval stores; but from that date until 1805 they were never included in her treaties as contraband. However, in the following treaties made by her, viz. that of 1805 with the United States, of 1809 with Portugal, and of 1827 with Brazil, naval stores are expressly included as contraband; while, on the other hand, in treaties of 1674 with Holland, and 1677 with France, they are expressly excluded. France in only two treaties appears to have expressly included them as contraband, viz. in that of 1655 with the Hanseatic League, and in 1742 with Denmark. France has, save on two occasions, viz. in 1655 and 1742, consistently excluded naval stores from the category in contraband. The United States of America has, on two occasions at least, included them, viz. in a treaty with Great Britain in 1806, and by proclamation in 1861. Russia, in 1877 and 1904, declared naval stores to be contraband, but her treaties from the eighteenth century onward contain no mention thereof.

During the first half of the seventeeth century Great Britain, Spain, Sweden, and Holland, by their treaties, expressly included provisions in the category of contraband. From that time onward down to the latter part of the eighteenth century they expressly excluded them, and thenceforward no mention of provisions appears in any of their treaties, save in one with the United States in 1861, where they are expressly included. None other of the maritime Powers ever included provisions as contraband in their treaties.

In the treaties of the seventeenth century troops are generally expressly included as of the nature of contraband; but after that period, save in the solitary case of a treaty between Great Britain and Sweden in 1803, where they are expressly included, no mention of troops is made.

A review of the treaties between the principal maritime Powers demonstrates a general tendency towards the limitation of contraband to articles essentially intended for military and naval purposes, and establishes that the treaty policy of France and Russia, with occasional aberrations, has been in the direction of confining contraband within the narrowest possible limits. Great Britain, on the other hand, has almost uniformly—in consequence, doubtless, of her great naval power—shown a marked inclination to widen the ambit of contraband and extend it to articles *ancipitis usus;* but it would not be proper to regard the treaties into which she entered as indicating her general policy in relation to contraband: her treaties in no small degree reflected the policy which it was her interest to pursue in relation to the countries with which she from time to time made them.

It is usual for belligerents on the commencement of war to indicate the goods which they propose to regard as contraband either absolute or conditional. Here again the circumstances of each war constitute, within limitations, the deciding factor as to what the belligerent elects to treat as contraband. In 1861 the United States, on the outbreak of war with the Confederate States, specified horses, money, naval stores, provisions, and troops as absolute contraband. On the other hand, Great Britain, during the past hundred years, has avoided committing herself to any full definition as to what things she will regard as contraband. Nevertheless, in 1904, when Russia at the commencement of her war with Japan included coal among articles of absolute contraband, Great Britain vigorously protested, and Lord Lansdowne, the Foreign Secretary, in a letter to the London Chamber of Commerce, thus expressed the views of the British Government as to the attitude of Russia in respect of her classification of contraband, more especially in relation to coal and cotton. Referring to Articles VI and VII of the Russian Order of 28 February, 1904, as to contraband, he observes:—

"On the 18th March the Russian Government published instructions to the commanders of their warships, from which it appeared that additions had been made to paragraph 10 of Article VI, so as to include, under the head of provisions, forage, all kinds of grain, fish, fish products, beans, bean oil, and oil cakes, and to the list of remaining articles for use in war were added machinery and parts thereof intended for the manufacture of cannons, small arms, and projectiles. A Notice to this effect was published in the 'London Gazette' of the 22nd March, of which a copy is enclosed.

"On the 9th May following, His Majesty's Chargé d'Affaires at St. Petersburg reported by telegraph that cotton had been added to the list of articles declared to be contraband. As this was the first occasion, so far as Lord Lansdowne was aware, that this article had been so

described, inquiries were at once instituted at St. Petersburgh, as a result of which it transpired that the declaration applied only to raw cotton 'suitable for the manufacture of explosives,' and not to cotton yarns or tissues. Notices relating to this Order were duly published in the 'London Gazettes' of the 10th and 31st May last (see copies enclosed).

"Now, although a very large majority of the articles enumerated in the ten paragraphs of Rule 6 are unquestionably such as would be generally admitted to have an absolutely contraband character, the list included other articles, notably coal, naphtha, alcohol, rice, provisions, horses and beasts of burden, which are susceptible of use for peaceful as well as warlike purposes, and cotton falls under the same category. Inquiries were therefore at once instituted at St. Petersburgh, in order to ascertain whether the order implied that these articles were all regarded as unconditionally contraband.

"The Russian Government replied that this was the case, and His Majesty's Government thereupon expressed their great surprise and concern at this announcement. They did not contest that, in particular circumstances, provisions might acquire a contraband character, as, for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet might be lying, or if facts should exist which raised the presumption that they were to be employed in victualling the fleet of the enemy. In such cases, it was not denied that the belligerent would be entitled to seize provisions as contraband, on the ground that they would afford material assistance towards the carrying on of warlike operations. It was pointed out that the real test appeared to be whether there were circumstances relating to any particular cargo to show that it was destined for military or naval uses; but that to treat such articles as unconditionally contraband, was a step which His Majesty's Government regarded as inconsistent with the law and practice of nations. They further stated that they would not consider themselves bound to recognize as valid any decisions inconsistent with these principles, or otherwise not in conformity with the recognized principles of international law, which might be given by the Russian Prize Courts. It will doubtless be within the recollection of your Chamber that this statement was publicly reiterated both by Lord Lansdowne in the House of Lords and by the Prime Minister in the House of Commons on 11th August last.

"It is proper, however, to observe that a decision of a Prize Court must be understood to mean, not merely the decision of a Court of First Instance, such as those established at Vladivostock, Libau, and elsewhere, but that of the Supreme Admiralty Council at St. Petersburgh, to which appeal lies from the inferior Courts, just as, in this country, appeal lies from the finding of a Vice-Admiralty Court to the Judicial Committee of the Privy Council, and the usual legal remedies should as a rule be exhausted before diplomatic intervention can properly be invoked.

"With regard to the question of coal and the other articles of fuel enumerated in paragraph 8 of Rule 6, His Majesty's Government represented that the treatment of this article by Russia as unconditionally contraband was diametrically opposed to the declaration made by the Russian Plenipotentiary at the West African Conference held at Berlin in 1884, who stated that his instructions were peremptory, and that his Government refused categorically to consent to any Treaty, Convention,

or Declaration of any kind which would imply the recognition of coal as contraband of war. His Majesty's Government accordingly urged that, like food-stuffs, coal should only be regarded as contraband when it was clearly intended for use by the military or naval forces of the enemy, and not merely because it was consigned for innocent or commercial purposes to private traders in the enemy country.

"His Majesty's Ambassador at St. Petersburgh has also urged upon the Russian Government the unfairness of treating raw cotton as unconditionally contraband. He has pointed out that the quantity of this article which might be utilized for the manufacture of explosives would be infinitesimal in comparison with the bulk of raw cotton exported from India and elsewhere to Japan for peaceful purposes, and that to treat harmless cargoes of this latter description as unconditionally contraband would amount to subjecting a branch of innocent commerce, which is specially important in the Far East, to a most unwarrantable interference.

"The Russian Government have met all these representations, as well as others which His Majesty's Government and that of the United States have thought proper to address to them, in a conciliatory manner, and it is satisfactory that they should have conceded one of the most important principles for which His Majesty's Government have contended, viz. that rice and provisions, mentioned in paragraph 10 of Rule 6, as well as articles not enumerated in paragraphs 1 to 9, but which may be put to warlike use, will henceforth be regarded only as conditionally contraband, according to the use to which they are to be applied. The onus of proof in such cases would lie with the captor, but it would obviously be in the interests of the owner to be prepared with evidence sufficient to displace any prima facie case which might be made against them. It is understood that Russian Naval commanders have been recently furnished with supplementary instructions, which His Majesty's Government have every reason to believe will be interpreted in a liberal spirit, and will result in their exercising their belligerents' rights for the future in a less rigorous and vexatious manner."

In the precise words[1] used by Lord Granville in 1885, his successor of 1905 says that "H.M. Government did not contest that, in particular circumstances, provisions might acquire a contraband character, as, for instance, if they should be consigned direct to the [army or] fleet of a belligerent, or to a port where such fleet may be lying." But whereas the Foreign Secretary of 1885 qualified this, by adding the words "*and* facts should exist causing the presumption that they were about to be employed in victualling the fleet of the enemy," the Foreign Secretary of 1905 boldly changes "*and*" into "*or*," and thereby admits that it does not matter where the goods are consigned if there is any ground for thinking that they are about to be employed as naval victuals. Lord Granville certainly went on to say that the test of the contraband character of provisions was

[1] *Supra*, p. 44.

whether there existed circumstances sufficient to rebut, in a particular case, the presumption of innocence. But that he contemplated very extraordinary circumstances indeed, is plain from the fact that he was not prepared to admit that actual destination for a port of naval equipment was, of itself, enough.

One may ask whether the opinion of the older statesman was not the more satisfactory.

The following analysis of diplomatic documents may prove convenient:—

		Horses.	Money.	Ships.	Naval Stores.	Provisions.	Troops.
1179.	Lateran Council	·	·	·	(Timber)	·	—
1604.	Britain, Spain, Burgundy	·	×	·	·	×	×
1614.	Sweden, Holland (alliance)	·	×	·	·	×	×
1625.	Britain „ „	·	[Bullion?]	×	×	×	·
1640.	France „	×	·	·	·	·	×
1642.	Britain, Portugal (recognition)	·	·	·	·	·	(?)
1642.	Spain, Hanseatic League	—	—	[No definition]		—	—
1646.	France, Holland	×	·	·	·	·	×
1647.	Spain, Hanseatic League	—	—	[No full definition]		—	—
1650(?)	Spain, Holland	×	·	·	·	·	·
1654.	Britain, Sweden	—	—	[No definition]		—	—
1656.	„ „ (supplementary)	×	×	×	·	·	×
1661.	„ „ „	×	×	×	·	×	×
1654.	Britain, Holland	·	×	×	·	×	×
1655.	France, Hanseatic League	×	·	·	×	o	·
1655.	„ Britain	×	·	·	·	·	×
1659.	„ Spain	×	·	·	·	o	·
1661.	Portugal, Holland	—	—	[No definition]		—	—
1662.	France, Holland	×	·	·	·	o	·
1667.	Britain, Spain	×	·	·	·	o	×
1668.	„ Holland	×	·	·	·	o	·
1670.	„ Denmark	—	—	[No definition]		—	—
1674.	„ Holland	×	o	·	o	o	×
1677.	„ France	×	o	·	o	o	·
1678.	Holland „	×	·	·	·	o	·
1681.	France (ordinance)	×	·	·	·	·	·
1682.	Britain, Algiers	—	—	—	(Timber)	—	—
1701.	Denmark, Holland	×	·	·	×	·	·
1713.	France, Britain	×	o	·	o (and Timber)	o	·
1713.	„ Holland	×	·	·	·	o	·
1716.	„ Hanse Towns	×	·	·	·	o	·
1720.	Sweden, Britain	—	—	—	—	—	—
1739.	France, Holland	×	·	·	·	o	·
1742.	France, Denmark	×	·	·	×	o	·
1766.	Britain, Russia	—	—	—	—	—	—
1778.	France, U.S.A.	×	o	·	o	o	·
1780.	Russia (ordinance)	·	·	·	·	·	·
1780.	Sweden, Russia	—	—	—	—	—	—
1782.	Portugal, Russia, Holland, U.S.A.	×	·	·	o	·	·
	Denmark, Russia	·	·	·	·	·	·
1785.	U.S.A., Prussia	—	—	—	—	—	—
1786.	Britain, France	×	o	·	o	o	·
1787.	Russia, Two Sicilies	·	·	·	·	·	·
1800.	„ Sweden	·	·	·	·	·	·
1801.	„ Britain	·	·	·	·	·	·
1801.	Denmark, Britain	·	·	·	·	·	·
1803.	Britain, Sweden	×	×	×	[Q]	·	×

		Horses.	Money.	Ships.	Naval Stores.	Provisions.	Troops.
1806.	Britain, U.S.A.	·	·	·	×	·	·
1809.	„ Portugal	×	—	—	—	—	—
1810.	„ „	×	[And all things made contraband by any former treaties of either Power, if in the form of warlike instruments]				
1818.	Denmark, Prussia	·	·	·	·	·	·
1825.	U.S.A., Central American Federation	×	·	·	·	·	·
1826.	France, Brazil	·	·	·	·	·	·
1827.	Prussia „	·	·	·	·	·	·
1827.	Britain „	·	·	·	×	·	·
1828.	Denmark „	·	·	·	·	·	·
1831.	U.S.A., Mexico	×	·	·	·	·	·
1832.	Hanse Towns	·	·	·	·	·	·
1833.	U.S.A., Chili	×	·	·	·	·	·
1836.	„ Venezuela	×	·	·	·	·	·
1847.	Hanse Towns, Guatemala	×	·	·	·	·	·
1852.	Peru, U.S.A.	×	·	·	·	·	·
1854.	France and Britain (declaration)	—	[No full definition]		—	—	—
1854.	Lubeck (proclamation)	·	·	·	·	·	·
1854.	Sweden (ordinance)	·	·	·	·	·	·
1856.	France, Honduras	·	·	·	·	·	·
1859.	France, Nicaragua	·	·	·	·	·	·
1861.	Britain (proclamation)	—	—	[No full definition]		—	—
1861.	U.S.A. (declaration)	×	×	·	×	×	×
1864.	Prussia (proclamation)	·	·	·	·	·	·
1864.	[Canada] (proclamation)	·	·	·	×	·	·
1864.	Denmark (proclamation)	·	·	·	·	·	·
1864.	Austria (ordinance)	·	·	·	·	·	·
1864.	U.S.A., Hayti	×	·	·	·	·	·
1865.	U.S.A. (proclamation)	·	·	·	·	·	·
1866.	Spain (declaration)	—	—	[No full definition]		—	—
1866.	Peru (declaration)	—	—	[„	„]	—	—
1870.	France (declaration)	×	·	·	·	·	×
1874.	Peru, Argentine	×	·	·	[Q]	[Q]	·
1876.	Dominica (statute)	·	·	·	·	·	·
1876.	Guatemala (decree)	·	·	·	·	·	·
1877.	Britain (proclamation)	—	[No full definition]		—	—	—
1877.	Russia (decree)	·	·	·	×	·	×
1877.	Denmark (supplem.) proclamation	—	—	—	—	[No full definition]	
1885.	France (declaration)	—	—	—	—	[Q]	—
1895.	Russia (regulation)	·	·	[Q]	·	·	·
1898.	Spain (decree)	·	·	·	×	·	·

· = Not mentioned. × = Contraband. o = Expressly exempted.
[Q] = Included in a qualified sense (usually depending on the intention to make the articles subserve military ends).

Turning from the special consideration of treaties and ordinances to a general review of the policy pursued by the principal maritime Powers in relation to contraband, we may in the first place observe that the decisions of Admiralty Courts generally reflect the policy in relation to international law which is pursued in the countries to which they belong.

Thus we find that the decisions of the Court of Admiralty in England have, with rare exceptions, proceeded in the direction

of extending the list of contraband to its widest possible limits. In 1674, at a time when the naval power of England was less formidable, we find some departure from this attitude, and Sir Leoline Jenkins, in refusing to recognize the contraband character of pitch and tar, declared that only "what is directly and immediately subservient to the uses of war ought to be regarded as contraband, except in the case of besieged places." A century later, when the naval power of England had again become formidable, we find pitch, tar, hemp, sails, sailcloth, masts, copper sheathing, anchors, and practically every article of ships' equipment adjudged to fall within the category of absolute contraband; while grain, flour, biscuits, wine, cheese, money, bullion, and many other articles of ordinary commercial use, were held to be contraband if destined for a naval or military port or a place contiguous thereto, or consigned to the use of the naval or military forces of the belligerent enemy.

It may be asserted with some confidence that the *ratio decidendi* observed by the English Court of Admiralty in relation to goods *ancipitis usus*, and not included, like horses, in the list of absolute contraband, has been to apply, as a test whether or no they be contraband, what may be the destination of the commodities. If, on the one hand, they are being carried to a naval or military station or, on the other hand, they are in direct transit to the belligerent enemy's forces, then, with little or no regard to the character of the goods, the Court would adjudge them to be contraband.[1]

The Courts of the United States of America have generally adopted the theory and practice of contraband as recognized in England, and in the comparatively few decisions which they have given upon the law of contraband they have followed the judgments of the English Courts, and the reasoning upon which they were founded. As to provisions, they have laid down in definite terms that provisions, when their destination is to naval ports or the military or naval forces of the enemy, are contraband.[2] It must not, however, be overlooked that the United States in 1861[3] made a very broad declaration of contraband, including provisions, clothing, money, and "goods and commodities which might be useful to the enemy in war." On the other hand, when reopening trade with the Southern States she limited contraband to arms, ammunition, articles from which ammunition is made, and gray uniforms and cloth.[4]

[1] The "Jonge Margaretha," 1 C. Rob. at p. 194.
[2] *Vide infra*, p. 80.
[3] *Vide supra*, p. 39.
[4] Hertslet's "Treaties," Vol. XII, p. 946.

The kingdom of Spain has in respect of its legislation and judicial decisions displayed a tendency to limit contraband within the compass of things exclusively applicable to the purposes of war, and they attach a contraband character to provisions only when in course of transit to a blockaded or besieged place. Still, it cannot be doubted that naval stores, horses, marine engines, and other things which possess a special value in war she would treat as contraband wherever possible.

France, with one or two remarkable aberrations, has consistently sought to restrain within the narrowest limits the doctrine of contraband. Reference to the treaties into which she entered during the seventeenth, eighteenth, and nineteenth centuries show that she confined contraband of war to arms, munitions of war, saltpetre, and horses with their harness. She refused to recognize coal as contraband, even though destined for warlike purposes, and the decisions of the Conseil des Prises have rarely conflicted with the general policy of the State to confine contraband to "les objets transportés à l'un des belligérants dans le but de faciliter les operations militaires et dont il pourra se servir pour faire la guerre."[1] It is true that on rare occasions the law of France has not shrunk from recognizing as contraband articles of less primary warlike use, according to the purposes to which they were to be applied. Calvo[2] thus describes this class of contraband: "Contrebande conventionelle qui est dénoncée par des conventions ou des declarations particulières, des règlements speciaux, variables par conséquent suivant les circonstances, les besoins, les engagements mutuels des parties."

But France has with great steadiness maintained the policy regarding contraband declared in the Ordonnance de la Marine issued in 1681, by which she confined contraband to "weapons, powder, bullets, and other munitions of war, with horses and their harness." In 1854, when in alliance with England, she issued a notification containing the following list of contraband:—

"Les bouches et les armes à feu, les armes blanches, les projectiles, la poudre, le salpêtre, le soufre, les objets d'équipement, de campement et de harnachement militaire, ainsi que tous les instruments quelconques fabriqués à l'usage de la guerre lorsqu'ils sont destinés à l'ennemi."

In the later wars, including that of 1870,[3] with general consistency she has followed the precedent of her ordinance of 1681.

Having stated in general terms the policy of the various nations which have had experience of maritime conflicts, let us

[1] Bluntschli, "Le Droit International Règle," p. 802.
[2] Vol. V, sec. 2739.
[3] *Vide* Barboux, "Jurisp. du Conseil des Prises," 1870–71; Appendix, Art. VIII

consider their history in more detail. A careful examination of the decisions of the English Court of Admiralty demonstrates that, with occasional interruptions, the policy of the Court has been in the direction of extending the rights of belligerents rather than in that of protecting the rights of neutrals. It has, in common with the general trend of juridical opinion in Europe, accepted the tripartite division of Grotius as a basis; but its conception of absolute contraband soon ceased to correspond to Grotius' conception of things solely useful in war (if indeed it ever did so), and departed from that conception to a degree that other European States have not attempted to follow, though not even France maintains it in its absolute integrity.

From the latter part of the eighteenth century the English Court has classed tar, pitch, deals fit for naval purposes, copper sheets for sheathing ships, ships' masts and spars, sailcloth, hemp, and anchors as absolute contraband. These articles, of course, fall properly within the definition of *ancipitis usus*, but they were also of immediate and special value for the purposes of war. It may be observed that many of these articles have, for the purposes of modern warfare, lost all or the greater part of their value; thus masts and sailcloth are practically obsolete for naval purposes, and it may be doubted whether any reason exists for retaining them and certain other articles in the list of contraband contained in the manual of instructions issued by the Admiralty to naval officers.[1]

The era of steam and the advance of science have superseded masts, spars, and sailcloth by coal, engines, boilers, and other elements of machinery, and accordingly we find in the instructions issued to naval officers by foreign Powers and in our own manual of Naval Prize Law issued in 1888 by the Admiralty, an exhaustive list of goods, the products of modern invention, which are to be regarded as either absolutely or conditionally contraband. It may be noted that the publication of this manual, which is intended for the instruction of naval officers, has been discontinued from motives of public policy, but it may be assumed that the category of contraband articles has not been materially varied, unless by the inclusion of turbines and other modern machinery. The manual deals as follows with the question of contraband:—

"In order that goods may be contraband two conditions are necessary: (1) The goods must be fit for the purposes of war exclusively, or for purposes of war as well as of peace. (2) They must be destined for the use of the enemy in war. . . . All goods fit for purposes of war only,

[1] Bismarck is credited with the opinion that such goods have ceased to have a contraband character.

and certain other goods which, though fit also for the purposes of peace, are in their nature peculiarly serviceable to the enemy in war on board a vessel which has a hostile destination, are absolutely contraband.

"The list of goods absolutely contraband comprises:—

"Arms of all kinds, and machinery for manufacturing arms.

"Ammunition and material for ammunition, including lead, sulphate of potash, muriate of potash (chloride of potassium), chlorate of potash, and nitrate of soda.

"Gunpowder and its materials—saltpetre and brimstone—also gun-cotton.

"Military equipments and clothing.

"Military stores.

"Naval stores such as masts, spars, rudders, and ship timber, hemp and cordage, sailcloth, pitch and tar; copper fit for sheathing vessels; marine engines and the component parts thereof, including screw propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, and fire bars; marine cement and the materials used in the manufacture thereof, as blue lias and portland cement; iron in any of the following forms: anchors, rivet iron, angle iron, round bar if from $\frac{3}{4}$ to $\frac{8}{8}$ of an inch diameter, rivets, strips of iron, sheet plate iron exceeding $\frac{1}{4}$ of an inch, and 'low moor' and bowling plates.

"Goods conditionally contraband:—

"All goods fit for purposes of war and peace alike (not hereinbefore specified as absolutely contraband) on board a vessel which has a hostile destination, are conditionally contraband; that is, they are contraband only in case it may be presumed that they are intended to be used for purposes of war; this presumption arises when such hostile destination of the vessel is either the enemy's fleet at sea or a hostile port used exclusively or mainly for naval or military equipment.

"The list of goods conditionally contraband is:—

"Provisions and liquors fit for the consumption of army or navy.

"Money.

"Telegraphic materials such as wire, porous cups, platina, sulphuric acid, and zinc; materials for the construction of railways, as iron bars, sleepers, etc.

"Coals.

"Hay.

"Horses.

"Rosin.

"Tallow.

"Timber."

It should be noted that the British Government treat coal as conditionally contraband. It is not easy, in view of the essential part that coal takes in navigation, to appreciate the principle upon which sailcloth, obviously an article *ancipitis usus*, is classed as absolute, and coal merely as conditional contraband, except on the ground that coal is not only of marine, but of universal and all-important civil, use. For the latter reason the British view as to coal is probably the most convenient and therefore the most acceptable, for the requirements of commerce and manufactures render

coal an article of prime necessity, and some countries are partially or wholly dependent upon its import for the maintenance of their manufacturing industries. During the Franco-German war the action of British merchants in exporting large quantities of coal to France was the subject of a sharp protest by Prince Bismarck,[1] and it is probable that Germany will, in the event of her being concerned in war with a naval Power, insist upon the character of absolute contraband being assigned to coal. France, on the other hand, has consistently contended that coal should not be regarded as contraband.[2]

The Russian Government in 1884, by its plenipotentiary at the conference held at Berlin respecting the Affairs of Africa,[3] peremptorily protested against the proposal of Great Britain to include coal as contraband of war. He observed:—

"Je veux parler de la proposition Anglaise (voir Annexe No. 10 au Rapport) dans laquelle la houille se trouverait rangée parmi les articles devant être considérés en vertu du droit des gens comme contrebande de guerre.

"Sans vouloir en aucune façon soulever ici un débat à ce sujet je dois déclarer, pour me conformer à mes instructions, que le Gouvernement Impérial de Russie n'accepterait en aucun cas une telle interprétation.

"Sur ce point mes instructions sont peremptoires. Le Gouvernement que j'ai l'honneur de representer ici refuserait categoriquement son assentiment à l'Article d'un traité, d'une Convention ou d'un Acte quelconque, qui impliquerait la reconnaisance de la houille ou du charbon comme contrebande de guerre."

Nothing could have been more precise or more specific than this declaration of Count Rapnist, and yet within ten years from the date thereof the Russian Government, on the outbreak of hostilities with Japan, declares without reservation coal to be contraband.

The question whether or no coal should be classed as contraband has not yet been submitted to an English Court. Lord Justice Cockburn extra-judicially observed:[4] "Coal, too, though in its nature *ancipitis usus*, yet when intended to contribute to the motive power of a vessel must, I think, as well as machinery, be placed in the same category as masts and sails, which have always been placed among articles of contraband." It has been observed that masts and sails have almost uniformly been held to be absolute contraband, therefore the Lord Chief Justice would seem to indicate that coal should be so regarded. But

[1] State Papers, Vol. LX, p. 895.
[2] The "Moniteur," 29 May, 1859; "Journal Officiel," 1870.
[3] State Papers, Vol. LXXV, p. 1235.
[4] Parliamentary Papers, America, 1873, No. 2, p. 15.

it is highly improbable that a British Court would so hold, or go any further than declaring it contraband when in transit for the naval port or fleet of a belligerent.

The doctrine of the English Courts with regard to provisions is that they are only contraband when destined for a naval port or in transit to a naval armament. The decision of Sir W. Scott in 1799[1] that the destination is the true test to be applied can hardly be doubted to be that which will in the future govern our Courts, although it may receive a somewhat liberal construction. The attempts which have from time to time been made by belligerents to extend the application of contraband to provisions destined to supply the requirements of the civil population of a belligerent country has not received, and probably will never receive, judicial sanction. The American Courts have adopted the same view, and in 1814 Story J. thus concisely stated the rule which should govern the question as to whether or no they are contraband: "If destined for the ordinary use of life in the enemy's country they are not in general contraband, but it is otherwise if destined for military use. Hence, if immediately destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."[2] France has, apart from her retaliatory declaration against Great Britain in 1793,[3] and her remarkable action in relation to rice during the Franco-Chinese war,[4] uniformly insisted upon the non-contraband character of provisions; but instances are not wanting to show that she is not prepared to apply this doctrine in practice to the extent of permitting provisions to enter freely the naval port or to supply the army of a belligerent enemy.

During the course of her war with Japan, Russia, by her supreme tribunal, boldly declared cotton in transit for Japan—its destination being to a commercial port, or at any rate a port only incidentally used for naval purposes—to be contraband.[5] There was no precedent for this action. It is true that during the American Civil War of 1861 the United States Government declared cotton to be contraband, but herein they acted on the basis that it constituted munitions of war in the same sense that coin or bullion has been held to be so when destined for the purpose of carrying on war, the Confederate States having negotiated loans for belligerent purposes on the security of cotton.[6] Russia sought to justify her action on the ground that

[1] *Vide infra*, p. 72.
[2] The "Commercen," *vide infra*, p. 80.
[3] *Vide supra*, p. 28.
[4] *Supra*, p. 44.
[5] The "Calchas," *vide infra*, p. 87.
[6] Cf. the ground alleged for the French treatment of rice in 1885, i.e. that it was equivalent to tribute in currency.

cotton falls within the same principle that governs saltpetre and sulphur, which have consistently been held contraband because they are ingredients (of less comparative civil usefulness than charcoal) in the manufacture of gunpowder; if cotton were destined for a naval port it would be extremely difficult to negative the propriety of its classification as contraband, even though the quantity carried were enormously in excess of what could possibly be required for the manufacture of explosives, and for this reason:—the right of the belligerent to interdict the carriage of certain goods to the enemy is founded on the consideration that such goods may directly assist the enemy in his hostile operations, and the fact that only a small fraction thereof could be of practical service can in no sense disentitle the belligerent to prevent the access of the whole, which *per my et per tout* is capable of being used for hostile purposes.

If the belligerent is thus entitled to confiscate, irrespectively of the importer's intention, it becomes, as Dana remarks, very difficult to justify, conversely, the concession to him of the right to confiscate goods not otherwise confiscable, simply on account of the intention of the importer to make them subservient to belligerent operations.

It has already been observed that in deciding whether articles *ancipitis usus* are contraband the Court applies the test what may be the destination of the ship, viz. whether to a naval port or to an enemy's ships of war, or to some harbour or port immediately adjacent thereto, and which may therefore be a place of equally convenient supply to the enemy. In one case in 1805[1] Sir W. Scott held that cheese being carried to Corunna was contraband, because, if Corunna were not itself a naval port, it was in such close proximity to Ferrol, being situate in the same bay, that it might be immediately and in the same conveyance carried to Ferrol. In a former case, the "Frau Margaretha,"[2] he held that inasmuch as the destination of the ship was to a commercial port (Quimper), the fact that it was contiguous to a naval port (Brest) was not sufficient to make the cargo contraband, since it was separated therefrom by a promontory "so as not to admit of an immediate communication except by land carriage."

It is very obvious that improved means of transit, and the ambiguous character which science and modern invention has given to commodities formerly solely appropriated to peaceful purposes, has rendered the problem which the law of contraband presents very much more difficult both for the statesman and also for the naval officer. Russia in her war with Japan has boldly

[1] *Vide infra*, p. 78. [2] *Ibid.*

attempted to cut the knot by classifying as absolute contraband articles which hitherto have been uniformly, or almost uniformly, treated either as innocuous or only conditionally contraband; but in so doing she has attempted to extend the power of belligerents over neutral commerce to an almost insupportable degree. On the other hand, it is equally unfair to the belligerent that, under cover of destination to a commercial port, but under circumstances which afford a conclusive presumption that they will be thence conveyed by land carriage for the use of his enemy in the field, goods *ancipitis usus* may not be seized; or again, that goods—e.g. cotton and coal—to which modern science has given a military or naval value, but which to a vastly preponderating extent are used for peaceful purposes, should enjoy immunity from seizure, and thus afford to the enemy the most valuable assistance in his warlike operations. In declaring cotton absolute contraband, Russia has, it may be submitted, unnecessarily interfered with an important branch of neutral commerce. To a country which, like Japan, carries on an extensive manufacture in cotton fabrics, the raw cotton carried to her shores is, less an infinitesimal fraction required for the manufacture of explosives, exclusively used for the arts of peace; nor can it be supposed that the effective prevention of the access of cargoes of cotton to her shores during the pendency of a war would leave her destitute of the fraction so required. On the other hand, coal, and especially steam coal, is not merely an article of prime necessity for naval purposes, but is required in large quantities, so that to a country which is wholly or mainly dependent upon foreign sources for its coal supply, the interception of that supply is a matter of most serious moment so far as its capacity for carrying on naval operations is concerned. The application of the test of destination may with some plausibility be represented as fallacious. The interposition of a hundred miles or so between the commercial port of consignment and the naval base to which the consignee intends to transmit the cargo appears in these days of railroads and steam engines of trifling importance. On the other hand, it must not be forgotten that the modern cruiser has an immense advantage over the average merchantman which was not enjoyed by the ancient sailing-ship. The "Alabama's" career shows this. It is hardly reasonable to expect neutrals to submit to all the disadvantages, and to resign all the benefits of progress.

Canal traffic is still a serious rival to railway transport. Yet Lord Stowell never attacked the trade of a safe port because it was connected with a dangerous one by canals. And the mere existence of transport facilities must not blind us to the fact

that they are always open to interruption, not to speak of congestion, as we know by the experience of the Siberian railway. Accordingly, if the present rule of destination as the final test be abandoned and that of intention be applied, it is obvious that neutrals will be placed in a worse position; and, in fact, in the vast majority of cases of seizure of goods *ancipitis usus*, it would be practically impossible to demonstrate to the satisfaction of a Prize Court that the goods were not intended for hostile purposes.[1] There has been some tendency both on the part of political and judicial authority to apply the test of intention where that of destination fails in establishing whether goods are or are not contraband; but so far no serious attempt has been made to tamper with the principle that destination only is the true test to be applied. Recently an interesting question arose between Great Britain and Germany, viz. whether a cargo of absolute contraband proceeding in a neutral ship to a neutral port, but with an ultimate destination to her enemy from that port by land carriage, can be properly seized by a belligerent.

Germany, in the case of the "Bundesrath,"[2] vigorously protested against this doctrine, and insisted that a neutral ship bound to and from a neutral port is not liable to seizure for contraband. The full discussion of such cases is reserved for a later chapter; but it may here be said that the British Government derived strong support from the American cases of so-called "continuous voyage, and from the declared opinion of Bluntschli, who observes: "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrebande de guerre et la confiscation sera justifiée."[3]

The question of applying some precise and definite test as to the conditions under which articles *ancipitis usus* may properly be seized by a belligerent still remains a disputed point, and thus a source of grave injury to neutral commerce and peril to international friendship. In default of any better, the ancient rule as to character of port of destination still obtains; but the supposed inefficiency of this rule to afford adequate protection to belligerents has, as we have pointed out, had two regrettable results—first, in the extension by belligerents of the category of goods absolutely contraband, as in the case of coal and cotton by Russia in her war with Japan;[4] and secondly, under the

[1] See the "Zelden Rust," p. 78, *infra*; the "William," 5 Rob., 385; and Seymour *v.* London and Provincial Marine Insurance Co., 41 L.J.C.P., 193.

[2] See the "Peterhoff," *infra*, p. 81, and the "Bundesrath," Parliamentary Papers, 1900, Africa, No. 1.

[3] Bluntschli, "Droit International Codifié," sec. 813.

[4] *Vide supra*, pp. 60–1.

stress of circumstances, in the violation, as in the case of the "Bundesrath," from time to time of the rule as to destination.

It is said that this archaic rule as to destination is wholly inadequate to and incompatible with modern conditions. But the scrupulous care with which Scott, in the crisis of Great Britain's fortunes, respected the trade of such ports as Quimper (thirty miles from Brest), Emden, Tonningen, and San Sebastian, may give pause to reforming zeal. What may be the true solution of the vexed question as to when a cargo of goods *ancipitis usus* are properly liable to seizure it is not easy to divine. A naval officer who stops a vessel laden with goods *ancipitis usus* has only the destination as evidenced by the ship's papers and the statements of its crew to guide him; if the vessel be bound for a commercial port, though he may be convinced that in its facilities as a base of military or naval supply the port may satisfy every requirement of the enemy, yet his instructions do not permit him to seize the vessel, because she is not bound for a naval port. The rule is preposterous, unless applied with reasonable latitude, for otherwise most essential aid may be rendered to a belligerent in food, clothing, or materials for the manufacture of articles for military or naval use, and it may well be that the dangerous area of each military port has been somewhat increased since Lord Stowell's day. Probably the true solution can alone be found in extending the application of absolute contraband to such articles as, though now regarded as *ancipitis usus*, have a special and exceptional value either in their crude or treated state for the purposes of war; and as to articles *ancipitis usus*, other than those made absolute, in affording full security to neutrals in trading therein with belligerents, save in cases of besieged ports or blockaded areas. It is not, indeed, probable that nations whose interests are diverse as to what articles should or should not be treated as absolute contraband will agree upon an exhaustive list; but with regard to cotton, coal, engines, railway plant, and machinery—commodities which constitute so large a portion of the world's commerce—it is not unreasonable to suggest that some definite rules might be laid down which, while affording due protection to the belligerent, might preserve neutral commerce from the vexatious interference to which it was subjected during the Russo-Japanese war.

The conveyance to the territory, or the naval or military forces of the enemy, of persons or despatches in or for his service, is of the nature of the transport of contraband, though it partakes also of the nature of active assistance to the belligerent.

As regards despatches, if they be from an ambassador or

accredited agent of the enemy who is resident in a neutral State —whether they be addressed to his own Government or otherwise—they are clearly not of the nature of contraband,[1] and it would seem that the neutral is only liable in respect of the carriage of despatches at all if he had knowledge, or the circumstances were such that he might be assumed to have knowledge, that such despatches were associated with the war. The principal test to be applied for the purpose of fixing him with liability, though not necessarily the only test, is the destination of the despatches; thus, if addressed to a military or naval officer of the enemy or to some person who may be presumed to be the accredited agent of the enemy, it may reasonably be inferred that the master or owner had knowledge; nor is it necessary to establish that he was privy to the contents of the despatches. It has been decided that when despatches, addressed to a private person, were given by a private person to the master of a ship, who swore that he was ignorant of their contents, the ship should be released on the ground that there was no knowledge of their character on the part of the master.[2] This decision is hardly consistent with those in the "Caroline" and "Orozembo,"[3] when it was laid down that neither force nor fraud upon the part of the enemy will avail as an escape from penalty; and this on the reasonable and well-nigh conclusive ground that if it be conceded that fraud or compulsion is a good defence, it would be almost impossible to prove the contrary. Calvo, indeed, in the spirit of leniency which is characteristic of his treatment of the law of contraband, thus defines the measure of liability on the part of the neutral: "Mais pour que la confiscation puisse equitablement être prononcée il ne suffit pas que les dépêches ennemies soient trouvées à bord; il faut encore que leur transport constitue réellement un acte hostile et pour cela: 1° que la dépêche soit relative à la guerre; 2° que ce navire ait été expressément affrété dans ce but."[4] It is obvious that a strict recognition of the second condition asserted by him as precedent to liability would almost uniformly place despatches beyond the ambit of the law of contraband.

But when a vessel is in the ordinary way of its trade a carrier of mails, it would be most unreasonable to visit the carrier with penalty because obnoxious despatches were found in her postbags; wherefore belligerents have usually issued instructions to their naval officers to exercise great consideration towards vessels

[1] See the "Caroline," *infra*, p. 79.
[2] The "Rapid," Edwards, 228.
[3] 6 C. Rob., 430.
[4] Calvo, sec. 2801.

engaged in postal service.[1] They are, of course, subject in the same way as other vessels to visit and, indeed, to capture (or, by consent, to seizure of their mail bags), on the reasonable presumption that they contain despatches to the enemy.

Many mail steamers of foreign countries have a special connexion with the national government. Unless the latter accepts full responsibility for them, coupled with entire control, as in the case of navy ships, it is difficult to see that this is any reason for extending to them special treatment.

Regarding the transport of belligerent persons, it is generally held that they must be of high rank or of considerable number to entail the penalty of capture and condemnation on the vessel.

We shall now discuss the cases *seriatim*.

TABLE OF CASES ON CONTRABAND

1674.	Pitch and tar	Sir Leoline Jenkins' opinion.	Wynn's "Life of Sir L. Jenkins," Vol. II, p. 751.
1776.	Guns, powder, soldiers	The "Hendric and Alida"	1 Marriott's Rep. 96.
1778.	Masts, spars, deals	The "Vryheid"	1 Marriott's Rep. 188.
1778.	Hemp, pewter, copper sheets	The "Concordia Affinitatis"	1 Marriott's Rep. 169.
1778.	Deals, guns, iron shot	The "Sarah & Bernhardus"	1 Marriott's Rep. 175.
1778.	Sailcloth, deals, copper sheets	The "Juffrow Anna Gedruth"	1 Marriott's Rep. 221.
1779.	Iron, tar, pitch, deals	The "Brita Cæcilia"	1 Marriott's Rep. 234.
1793.	Masts	The "Staadt Embden"	1 C. Rob. 26.
1798.	Balks, fir planks, battens	The "Endraght"	1 C. Rob. 21.
1799.	Corn	The "Haabet"	2 C. Rob. 174.
1799.	Pitch and tar	The "Jonge Tobias"	1 C. Rob. 329.
1799.	Cheese	The "Jonge Margaretha"	1 C. Rob. 188.
1799.	Pitch and tar	The "Sarah Christina"	1 C. Rob. 237.
1800.	Tallow, sailcloth	The "Neptunus"	3 C. Rob. 108.
1801.	Cordilla hemp	The "Gute Gesellschaft Michael"	4 C. Rob. 94.
1801.	Spars, balks, ship-timber	The "Twende Brodre."	4 C. Rob. 33.
1801.	Wine	The "Edward"	4 C. Rob. 68.
1802.	Hemp	The "Apollo"	4 C. Rob. 158.
1802.	Pitch and tar	The "Twee Juffrowen"	4 C. Rob. 242.
1804.	Masts	The "Charlotte"	5 C. Rob. 305.
1804.	Rosin	"Nostra Signora de Begona"	5 C. Rob. 97.
1804.	Ships	The "Brutus"	5 C. Rob. Appendix.
1804.	Copper sheets	The "Charlotte"	5 C. Rob. 275.
1805.	Cheese	The "Zelden Rust"	6 C. Rob. 93.
1805.	Biscuit and flour	The "Ranger"	6 C. Rob. 125.
1807.	Ship timber	"L'Etoile de Bonaparte"	1 Pistoye et Duverdy, 409.
1808.	Despatches	The "Atalanta"	6 C. Rob. 440.
1808.	Despatches	The "Caroline"	6 C. Rob. 461.
1808.	Military persons	The "Orozembo"	6 C. Rob. 430.
1808.	Military persons	The "Friendship"	6 C. Rob. 420.
1814.	Grain	The "Commercen"	1 Wheaton, 382.
1815.	Corn	Maisonnaire *v.* Keating	2 Gallison's Rep. (U.S.) 325.
1866.	Artillery, harness, army boots	The "Peterhoff"	5 Wallace's Rep. (U.S.) 28.
1867.	Harness, army boots	Hobbs *v.* Henning	17 C.B.N.S. 791.

[1] "Revue de Droit International," XI, p. 582.

TABLE OF CASES ON CONTRABAND—*continued.*

1875.	Money, plate, bullion .	United States *v.* Dickelman	2 Otto's Rep. (S.C.U.S.). 520.
1900.	Provisions . . .	The "Benito Estenger" .	176 U.S. Rep. 568.
1903.	Horses . . .	The "Juno" . . .	38 Ct. Cl. (U.S.) 465.
1903.	Tar . . .	The "Bird" . . .	38 Ct. Cl. (U.S.) 228.
1904.	Coal . . .	The "Allanton" . .	——
1905.	Cotton, logs, flour, machinery . . .	The "Calchas" . .	——

Pitch and tar.

In 1674 a cargo of pitch and tar was laden on board ship by a British merchant for conveyance to Rouen, and was captured by a Spanish war vessel. The question whether or no pitch and tar were contraband was, on a petition from the merchant, submitted by the Crown for Sir Leoline Jenkins' opinion, who, after declaring that there was nothing in the treaty of 1667 between England and Spain to render these commodities contraband, proceeds :—

"These goods therefore . . . . cannot be judged by any other law, but by the general law of nations; and then I am humbly of opinion that nothing ought to be judged contraband by that law in this case, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general notification made by Spain to all the world that they will condemn all the pitch and tar they meet with."[1]

Masts, spars, deals.

The "Vryheid"[2] was a Dutch (neutral) ship bound from Riga to Rochfort laden with masts suitable for ships of war, spars and deals, which, by instruction of the French Consul at Elsinore, she was to deliver at Rochfort. The Dutch master claimed the cargo as privileged under the treaty of 1674 between England and Holland. Article IV thereof was as follows :—

"Masts, planks, boards and beams of any kind of wood, and all other materials requisite for building or repairing ships, shall be wholly reputed free goods, so that the same may be freely transported and carried by the subjects of the States to places under the obedience of the enemies of his said Majesty, except only to places besieged, blocked up, or invested."

The Court, in giving judgment, observed :—

"By the general law and usage of nations (treaties and extraordinary stipulations out of the question) there are two sorts of things confiscable: First, all those generally which belong to an enemy found on board the ships of a friend; secondly, those which belong to a friend, but which will aid the enemy to maintain war. These latter are contraband, so that one of the ideas inseparably annexed to contraband, and to the exception of contraband, is that the goods excepted or not excepted

[1] Wynne's "Life of Sir Leoline Jenkins," Vol. II, p. 751.
[2] Marriott's Rep., 74.

belong to a friend; from which it is clear that the goods of the Dutch subject specially or generally enumerated in Article III (which set forth a list of goods to be considered contraband) are contraband; and that masts, etc., etc., and all other materials requisite for building and repairing ships excepted in Article IV, do mean such masts, etc., which do also belong to a friend, and are going in the ordinary course of trade as ordinary merchandise and for mercantile purposes. This must be the natural sense of the stipulation. For to admit a right of being the privileged carriers of the enemy to the royal docks would work such an adoption of a hostile character, would defeat every idea of alliance and confederacy of the contracting parties, and transfer the federal union over to the other belligerent.

"The great argument is that all subsisting treaties of commerce and alliance, offensive and defensive, are to be taken as one contract, *uno contextu*, and the spirit of the federal union is to interpret the letter so that no one treaty or article of the treaty is to be taken substantive or standing alone and single from the rest.

"The secret article of Westminster, 1673–4, is as strong as possible. The words are—

"'Neither of the said parties shall give nor consent that any of their subjects or inhabitants shall give any aid, favour, or counsel, directly or indirectly, by land or sea or on the fresh waters, nor shall furnish, nor consent that the subjects and inhabitants of their dominions and countries shall furnish, any *ships*, soldiers, mariners, provisions, money, instruments of war, gunpowder, or any other things necessary for making war to the enemies of the other party of any rank or condition whatsoever.'

"It is very clear that ships may be furnished by piecemeal as completely as if they sailed out of the Texel with all their furniture. If one Dutch ship carries masts, another anchors, another cordage, another sails, another a ship's frame . . . a whole fleet may go by detail from Holland for the King of France's service."

The reasoning of the judgment, limiting the clear words of the treaty of 1674 to a mere transference of naval stores from the category of absolute to that of conditional contraband, is not particularly strong, and lends some colour to the general complaint of continental authors against the English Prize Courts. But Holland had been equally unfortunate in a treaty made with France in 1646. She expected she had secured the recognition of the principle "Free ships, free goods": but found that the French interpretation of the treaty was merely that it abolished the rule that the neutral carrier and neutral goods were confiscable as well as the hostile goods on board his ship.[1] Marriott, however, is of no great authority as a judge. His decisions were such, says Story, as no other person would ever follow.

This particular interpretation of the Dutch treaty of 1674 was abandoned by the King's advocate in the case of the "Apollo."[2]

[1] Vattel, III. c. 7, sec. 115, note.
[2] 4 C. Rob., 158, 159.

Guns, powder, soldiers.

During the war of American Independence a Dutch ship, the "Hendric and Alida,"[1] was captured by an English cruiser when with a cargo of powder and guns, and with foreign officers on board, on the ground that she was carrying the said powder munitions to the rebels in America. The King's advocate asked the Court to decree that so much of the cargo as was harmless should be restored, the powder, guns, and military stores should be sold to His Majesty on a valuation, and to decree expenses in favour of the captor. The Court in ordering the restoration of the ship and cargo, founded their decision on the ground that there was no proof that the powder and munitions of war were going for the use of the rebels; the Court, however, awarded costs in favour of the captors, Sir George Hay observing—

"That the condition of the ships being armed, and having officers going to the Provincial Army (the Rebels) is a great point against the claimants for costs, and must have struck Lord Mulgrave [the British naval officer]. If it was clear that she was going to New England, touching at St. Eustatia, that would never do. All ships trading thither are confiscable."

The case therefore seems to have been one of continuous voyage. The vessel was *en route* for St. Eustatia, and an ultimate intention that the ammunition should reach the rebels was held to be insufficient; in spite of Dr. Marriott's appeal to the Court to "justify Lord Mulgrave."

Deals, guns, iron shot.

The "Sarah and Bernhardus"[2] was a Danish (neutral) ship laden with deals, guns, and iron shot, bound from Christiania to Havre de Grace, and was captured by a British privateer. The Court[3] gave judgment as follows :—

"As the stores were clearly Danish property and destined for a *market* either French [France was then at war with England] or English, and as hostilities were not notified, and the concealment, if any (for it was not fully proved), was necessary to preserve the cannon and balls from confiscation in France on account of Portsmouth being named [as the place at which cannon and balls were to be sold], it showed no *mala fides* in the Danish [exporter]."

The Court restored the ship, and ordered such of the deals as should be fit for the navy, and ordnance stores, to be sold for His Majesty's use.

The fact that hostilities had not been notified does not seem very important, in view of the further fact that precautions had been taken to preserve the munitions from confiscation in France, which could only have been in the exercise of a belligerent right.

[1] 1 Marriott, 96 (*circa* 1776). [2] *Ibid.*, 174.
[3] Sir Jas. Marriott.

And the ship-master swore positively that he was to sell the cannon and balls at Havre, if he could. The case is decidedly one of "a lenient administration of justice." The judge intimated that ordnance would be confiscated in future.

Hemp, pewter, copper, hogsheads.

The "Concordia Affinitatis,"[1] a Swedish neutral ship, laden with hemp, pewter, copper, staves, hogsheads, and small casks on voyage to France (then at war with England), was captured by a British cruiser. The Court restored ship and cargo, except the hemp and such copper sheets as should appear fit for sheathing ships, which it ordered to be sold for His Majesty's use at a fair valuation by merchants, the proceeds of sale to go to the true owners of the goods. This also is an instance of pre-emption of absolute contraband.

Sailcloth, deals, copper sheets.

In the "Juffrow Anna Gedruth"[2] the Court directed sailcloth, deals, and copper sheets to be sold for His Majesty's use.

Iron, tar, pitch, deals.

But in the case of the "Brita Cæcilia,"[3] a Swedish ship from Elsinore to Brest and Nantz, the cargo of iron, tar, pitch and deals for the account of French merchants was condemned: freight and all reasonable charges being allowed the carrier.

Masts.

In the "Staadt Embden"[4] it was held that masts are contraband of war. Sir W. Scott, in his judgment, observes:—

"Most clearly the masts are liable to be so considered [contraband] in the judgment of the most zealous advocates of neutral commerce. As to the relaxation in favour of the export of native produce" [the masts were made of timber from Russia, from which country the vessel was proceeding when seized], "said to have been sanctioned by a determination upon Prussian hemp in the case of the 'Jonge Pieter,' I am by no means disposed to consider that case as laying down any such universal principle.

"There have been many cases in which native articles going to the enemy's ports on the account of inhabitants of the country which produced them have been treated as contraband. In the famous case of the 'Med Good's Hielp,' a cargo of pitch and tar going on Swedish account from Stockholm to Port Louis was condemned; that condemnation was afterwards confirmed by a solemn judgment of the Lords of Appeal, and the MS. note which I have of that case expressly states it to have been condemned on the ground of contraband."

It will be remembered that in the case in which Sir W. Scott is asserted by Wheaton to have departed from the rule of requiring captors to show a destination to a military or naval port, or to an army or fleet direct, in the case of conditional contraband, the cargo consisted of manufactured spars. In declaring the character of the port of destination to be immaterial, as he undoubtedly did in that case, he was plainly dealing only with the

[1] Marriott, 169.
[2] *Ibid.*, 221.
[3] *Ibid.*, 234.
[4] 1 C. Rob., 26

case of goods which, like spars and masts, are absolute contraband. (The "Charlotte," 5 C. Rob. 305.)

Cheese. Another illustration of the statement that the decisions of the Courts have generally followed the public policy of the country is afforded by the following case, which is also that in which Sir W. Scott laid down the character of the port as the governing, if not the only, test of conditional contraband, viz. that of the "Jonge Margaretha,"[1] sailing from Amsterdam to Brest with a cargo of cheese, and seized as concerned in a contraband trade of provisions to a port of naval equipment.

In giving judgment in this case, Sir W. Scott says:—

"I shall confine myself to the single question of law: "Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest, . . . or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy?'

". . . . Among the causes of exception," he proceeds, "which tend to prevent provisions from being treated as contraband, one is that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country.

"Another circumstance to which some indulgence by the practice of nations is shown is when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. In the present case the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

"But the most important distinction is whether the articles were intended for the ordinary uses of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place; and although it is possible that the articles might have been applied to civil consumption—for it being impossible to ascertain the final application of an article *ancipitis usus*—it is not an injurious rule which deduces both ways the final use from the immediate destination, and the presumption of a hostile use founded on its destination to a military fort is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which

[1] 1 C. Rob., 188.

a supply of these articles would be eminently useful. . . . I think myself warranted to pronounce these cheeses to be contraband."

Whether the rule laid down here as determining "both ways" the innocent or noxious character of goods which are prima facie innocent, has been abrogated by the facility with which, in modern times, goods can be transported from a commercial port to a military one by rail, may be seriously questioned. Sir W. Scott was disposed in the "Zelden Rust"[1] to treat Corunna on the footing of a military port on account of its extreme proximity to Ferrol. But it will not do to build too much on the analogy of so extreme a case; in fact, the same judge, on the previous day, refused to regard Quimper as identified with Brest.[2] A great responsibility and a great opportunity will be before the Privy Council of this country, if she should ever be a party to a naval war, in deciding on a consistent line of action in this and similar instances of difficulty. (*Vide supra*, pp. 62–65.)

Pitch and tar.

In the "Sarah Christina"[3] Sir W. Scott observes: "Pitch and tar are now become generally contraband in a maritime war, and they have been condemned as such by the highest authority in this country."

Balks, fir planks, battens.

In the "Endraght,"[4] on a voyage from Narva to Dort with a cargo of balks, fir planks, battens, and firewood, Sir W. Scott says:—

"It is asserted to be 'a cargo of ship timber going to an enemy's port of naval equipment,' and under this description to come under the character of contraband. This I consider to be the correct law of nations, notwithstanding some relaxations which may occasionally have been allowed."

Tallow, sailcloth.

In the "Neptunus,"[5] a cargo partly of tallow, partly of sailcloth, *en route* to Amsterdam, was held as to tallow not contraband, the judgment running as follows:—

"I am not disposed to consider it in that light" [of contraband] "on a destination to such a port as Amsterdam. Amsterdam is a great mercantile port, as well as a port of naval equipment; if it had been taken going to Brest, I should have little doubt about it."

As to sailcloth being contraband, the judgment being—

"That is universally contraband, even on a destination to ports of mere mercantile naval equipment. Amsterdam is a port both of great mercantile and military equipment."

Cordilla hemp.

In the "Gute Gesellschaft Michael,"[6] it being proved that a

[1] 6 C. Rob., 93.
[2] The "Frau Margaretha," 6 C. Rob., 92.
[3] 1 C. Rob., 237.
[4] 1 C. Rob., 21.
[5] 3 C. Rob., 108.
[6] 4 C. Rob., 94.

coarse kind of hemp, denominated torse or cordilla hemp, was not fit for making rope or cordage, the cargo taken on a voyage from Lubeck to Bordeaux was ordered to be restored on payment of captor's costs. In a subsequent case, the "Jonge Hermanus," laden with a cargo of torse,[1] the Court held that the captors were justified in examining the cargo owing to the similarity between torse and hemp, and captor's expenses were allowed.

In the "Apollo,"[2] it was held by Sir W. Scott that hemp may be protected from confiscation by being proved to be the property and produce of the exporting country. A distinction is thus taken (as in the "Jonge Margaretha") which is much dwelt upon by text-writers, but which appears to be little regarded at the present day. The relaxation was introduced in favour of neutral navigation, and as counsel state in the "Apollo," it was thought to be limited accordingly to the export by neutrals of their own produce *in their own ships*. This construction was negatived in the "Jonge Pieter,"[3] decided in 1783 on appeal; which decision was followed in the "Apollo." The operation of the relaxation was not to remove the articles out of the category of contraband altogether. Hemp, it must be remembered, was absolute contraband; and the cargo of the "Apollo" (Russian hemp in a Prussian ship) was in course of transit to Amsterdam, which, although the principal Dutch port of naval equipment, cannot be said to have had the predominant character of a naval port. If the hemp had been going to Brest, it is unlikely that it would have been released. The case really appears to amount to this: that the military or civil character of the port must be the first inquiry; but that when the result of the inquiry is ambiguous, a further examination may be made regarding the quality and origin of the cargo. This is a reasonable rule, as there are many ports as to which it cannot be positively asserted that they are obviously and overwhelmingly military or civil; and it is submitted that it is the rule most consistent with the authorities.

Hemp. In this case it appears that a quantity of hemp, being the produce of Russia and the property of a Russian merchant, was taken on a Prussian ship on a voyage from Libau to Amsterdam. It was held that, although the cargo was not on board a Russian ship, yet as it was the property of a Russian merchant and the produce of Russia, it was not contraband of war.[4] Sir W. Scott says:—

"The question then being abstracted from the treaty is, whether hemp, being the produce and property of the country, but put on board the vessel of any other than the exporting country, is liable to confiscation?

[1] 4 C. Rob., 95.
[2] *Ibid.*, 158.
[3] *Ibid.*, at p. 162.
[4] *Ibid.*

Reference has been made to the case of the "Jonge Pieter," in which it was decided that this circumstance did not render it liable to be considered as contraband. In that case hemp, being Prussian property, was put on board a Dutch ship and sent to Bordeaux. It did not appear of what country the hemp was, but it was strongly argued that by the old rule contraband affected the ship as well as the cargo; that the relaxation that had taken place was introduced in favour of the ship, and as a concession to the navigation of neutral countries when employed in the exportation of their own produce or manufactures; that cases which did not fall within the reach of this principle were still subject to condemnation under the old law, and on this point three cases were relied on: the 'Sanctissimo Sacramento,'[1] the 'Goede Vreede,'[2] and the 'Juffrow Wobetha.'[3]

"On the part of the claimants it was contended that the relaxation was not so restricted as was asserted on the other side; that the old rule was departed from, and by the modern rule neutral merchants were at liberty to export the produce of their own country on their own account; that this being allowed, there was no reason why it might not be in other ships as well as those of their own country, it being equally in the course of their ordinary commerce to do so. Of the cases cited, it was said that the first was a cargo of Bolognese produce sold to a merchant of Genoa; it was therefore Bologna hemp going on Genoa account, and liable on that ground to confiscation. The second was a cargo of wheat sent by a Swede, who is by treaty disabled from carrying wheat. A vehicle, therefore, was used which it was unlawful to use, and the total disability of the ship to carry such a cargo put the cargo into an unlawful state. The third was a cargo of timber from Dantzic, which could hardly be, and was proved not to be, the produce of the territory of Dantzic, but of the neighbouring kingdom of Poland.[4] These are cases in which the unfavourable determination proceeded upon grounds that have nothing in common with the present case. But the case of the 'Jonge Pieter' was exactly parallel, being the case of a cargo of hemp on board a foreign ship. On that occasion the Court thought there ought to have been stronger proof that it was Prussian produce, but decreed the cargo to be restored. That case went up to the Lords, where the sentence of the Court of Admiralty was confirmed. It is therefore a direct precedent binding on this Court, and in conformity to that authority I shall direct this cargo to be restored."

In the "Twee Juffrowen"[5] where a cargo of pitch and tar, taken on a Prussian ship, was proceeding from Emden to Dieppe, it was held that, not being the produce of the exporting country, it was contraband, and the *onus probandi* was on the claimant. In the course of his judgment, Sir W. Scott observed:— Pitch, tar.

"I take it to be the established doctrine of this Court that pitch and

[1] 3 February, 1781. [2] 6 March, 1780.
[3] 8 August, 1781. Lords, 18 July, 1782.
[4] In the Court of Admiralty this cargo was condemned as contraband. On appeal, that sentence was reversed, on the ground that, though Dantzic was a free city, yet, being within the immediate protection of Poland, she was entitled to export a commodity at one of its own markets. [5] 4 C. Rob., 243.

tar are universally contraband, unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported, in which latter case they are considered on the more modern and lenient application of the rule as subject to pre-emption[1] only. In certain instances, where they constitute the great staple commodity of the exporting country, as of Sweden, the presumption may be allowed in favour of the claimant without absolute proof; but in respect to East Friesland, or any part of Prussia, the same presumption does not arise."

It is thus seen that the relaxation in favour of native produce (especially when unmanufactured) operated to reduce such produce from the category of absolute to that of "occasional" contraband. In the case of goods which would otherwise have been "occasional" contraband, it cannot have had much effect, since the danger of allowing naval stores and provisions to go to a port of naval equipment is too patent to allow the belligerent to be influenced by such considerations. The only case where it would come into play would be that mentioned on page 74 *supra*, viz. where the character of the port is indeterminate.

If the goods are "absolute" contraband, but home-grown, and the port indeterminate, the decision must probably turn on the immediate usefulness of the goods for war. Hemp was unconditionally released in the "Apollo" by Sir W. Scott; but would he have released saltpetre?

Wines. In the "Edward,"[2] a cargo of wines was found by the Court to be in course of carriage from Bordeaux to a French naval port, and was held to be contraband. Sir W. Scott observes:—

"Though wines are not an article generally contraband *per se*, yet in conjunction with all the circumstances of this voyage they are unquestionably to be considered naval stores. It was a voyage to Brest where there was notoriously a large armament lying very much in want of articles of this kind—articles of an indispensable nature. If such articles had gone with an avowed destination to such a place, and at such a conjuncture, the rule of pre-emption would have been a rule of excessive and undue indulgence to apply to such a case."

This was a case of wines in a Prussian ship (and obviously not the produce of Prussia). But it must be noted that there was the further element in the case, of a simulated destination to Emden, which involved the confiscation of the vessel. (See the "Evert.")[3]

Rosin. In "Nostra Signora de Begona"[4] it was held that a cargo of rosin going from St. Sebastian to Nantes was not contraband. Sir W. Scott in his judgment says:—

"Are there any cases in which this article is held to be contraband on

[1] It is curious that the hemp in the "Apollo" (*supra*) was *not* treated as subject to pre-emption. [2] 4 C. Rob., 68. [3] *Ibid.*, 354. [4] 5 C. Rob., 97.

a destination to a port merely mercantile? If it had been going to a military port of the enemy I should have had no hesitation, as there are many cases in which, under such circumstances, it has been deemed contraband. Going to a mercantile port it is not, I think, so decidedly of a warlike nature as to be excluded from the favourable consideration that are applied to other articles *ancipitis usus*. I shall therefore decree restitution."

Why rosin was treated so much more favourably than pitch and tar is worth consideration, and might furnish a key to the decision of questions as to the proper mode of regarding such articles as boilers, cotton, and the like. The captors say, in argument, that "it was an article much used as an ingredient in various military preparations." There can be little doubt that at the present day an article of such a nature going to a hostile port would incur grave risks. It may well be questioned whether modern views of contraband can be correct which go further than even a judge so leniently disposed towards belligerents as Sir W. Scott felt justified in doing. At the same time, Scott's test of the character of the port of destination may have become obsolete; and in that case it urgently requires to be replaced by a fresh one, equally independent of the floating suspicions of belligerents, and sufficiently definite to be provable by precise evidence.

Ships.

In the "Brutus"[1] it was held that ships built for purposes of war and not for peace, and going to be sold by a neutral to the enemy, are contraband of war.

From the cases of the "Fanny," the "Neptune," and the "Raven,"[2] it appears that in a case of any ambiguity as to the character of the vessels, the neutral was given the benefit of the doubt. The "Brutus" was pierced and fitted for ten guns, with netting stanchions for hammocks, and nettings fixed fore and aft.

Masts.

The "Charlotte,"[3] was a vessel bound from Riga to Nantes. In giving judgment of condemnation, Sir W. Scott observes:—

"What has been said on the other side is, I think, true, that the nature of the port is not material since masts, if they are to be considered as contraband, which they will be unless protected by treaty, are so without reference to the nature of the port, and equally whether bound to a mercantile port or to a port of naval military equipment. The consequences of the supply may be nearly the same in either case. If sent to a mercantile port, they may be there applied to immediate use in the equipment of privateers, or they may be conveyed from Nantes to Brest, and there become subservient to every purpose to which they could have been applied if going directly to a port of military equipment."

That is, manufactured masts and spars are absolute contraband.[4]

[1] 5 C. Rob., 331, and Appendix.
[2] *Ibid.*, Appendix.
[3] *Ibid.*, 305.
[4] *Supra*, p. 32

Copper sheets. In the "Charlotte,"[1] on the construction of Article I of the treaty of 1803 between Sweden and England, it was held by Sir W. Scott that copper sheets, certified to be fit for the sheathing of ships, are contraband. He, however, expressly declined to say that all copper in sheets was within the terms of the treaty, as "immediately serving for the equipment of ships of war."

Cheese. In the "Zelden Rust"[2] it was held that cheese going to a place of naval equipment and fit for naval use is contraband. On the question of destination, Sir W. Scott observes :—

> "Corunna is, I believe, itself a place of naval equipment in some degree, and if not so exclusively, and in its prominent character, yet from its vicinity to Ferrol it is almost identical with that port. These ports are situated in the same bay, and if the supply is permitted to be imported into the same bay, it would, I conceive, be impossible to prevent it from going on immediately and in the same conveyance to Ferrol. There is in this respect a material difference between the present case and the case which happened yesterday of similar articles going to Quimper. That port, though in the vicinity of Brest, is situate on the opposite side of a projecting headland or promontory, so as not to admit of an immediate communication except by land carriage."

In the case referred to by the judge (the "Frau Margaretha")[3] the cargo was cheese, *en route* to Quimper from Amsterdam. It is an instructive decision, because it touches directly the principle as to how far modern improved methods of land communication have destroyed the value of the nature of the port of destination as a test of contraband. Clearly, if Scott went far enough in encouraging belligerents—and some think he went too far—facility of land carriage can be of no importance as a reason for abandoning his test, in the face of the case of the "Frau Margaretha." And to leave the matter without a test at all, is *practically* to put all articles which could by any possibility be of use in war in the category of absolute contraband.

Biscuit and flour. The "Ranger."[4] This was the case of an American ship with a cargo of biscuit and flour in transit from Bordeaux to Cadiz. Sir W. Scott held, *inter alia*, that, as the cargo consisted of sea stores carried to a place of naval equipment, it was confiscable as contraband.

Ship timber. In 1807 the Conseil des Prises of France, in the case of "l'Etoile de Bonaparte," held that ship timber was not contraband of war, unless it was exclusively applicable to the construction of ships of war.[5] The Council thus declared the law in relation to ship timber :—

> "Attendu que le moyen déduit de la qualité des bois composant la

[1] 5 C. Rob., 275 [2] 6 C. Rob., 93. [3] *Ibid.*, 92. [4] 6 C. Rob., 125.
[5] Pistoye et Duverdy, Vol. I, p. 409; see also "La Minerve," *ibid.*, p. 410.

majeure partie de la caraison et sur lequel les capteurs ont le plus insisté, ne peut être accueilli si l'on considère que loin qu'il soit démontré que ces bois appartiennent exclusivement à la construction des batiments de guerre, comme l'ont pensé les experts qui ont opéré hors de la présence des parties intéressées le contraire semble resulter, tant de la teneur du procès-verbal de visite qu'ils ont irregulièrement dressé, que la dimension des planches et de leur nombre comparé avec la capacité du navire."

Despatches.

In the "Atalanta,"[1] the ship, being on voyage from Batavia to Bremen, touched at the Isle of France, then a colony of France, and took on board despatches from the Governor of the Colony to the Minister of Marine in Paris. The vessel was captured, and it was held by the Court that the carrying of despatches between a colony and its mother country which is a belligerent is an act injurious to the other belligerent, and a case of active "interposition in the war" for the benefit of the enemy, and that under certain aggravated circumstances the ship and cargo should be confiscated.

Despatches.

In the "Caroline,"[2] despatches on board a neutral ship, but going from the ambassador of the enemy's State resident in a neutral State to the departments of Government in France, were held not liable to seizure. In the course of his judgment, Sir W. Scott makes the following observation :—

"It has been asked, What are despatches? To which I think this answer may safely be returned: that they are all official communications of official persons on the public affairs of the Government. . . . This is not a case of despatches coming from any part of the enemy's territory, where commerce and communications of every kind the other belligerent has a right to interrupt. They are despatches from persons who are in a peculiar manner the favourite objects of the protection of the law of nations—ambassadors resident in a neutral country for the purpose of preserving the relations of amity between that State and his own Government.

"On these grounds a very material distinction arises with respect to the right of furnishing the conveyance. The former cases[3] were cases of neutral ships carrying the enemy's despatches from his colonies to the mother country. In all such cases you have a right to conclude that the effect of these despatches is hostile to yourself, because they must relate to the security of the enemy's possessions and to the maintenance of a communication between them. You have a right to destroy these possessions and that communication; and it is a legal act of hostility so to do. But the neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral State, but your reliance is on the integrity

[1] 6 C. Rob., 440.
[2] 6 C. Rob., 461.
[3] *Vide supra.*

of that neutral State that it will not favour nor participate in such designs, but as far as its own councils and actions are concerned will oppose them. . . . I have before said that persons discharging the functions of ambassadors are in a peculiar manner objects of the protection and favour of the law of nations. The limits that are assigned to the operations of war against them by Vattel and other writers upon those subjects are that you may exercise your right of war against them wherever the character of hostility exists. You may stop the ambassador of the enemy on his passage; but when he has arrived and has taken upon himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middleman, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested."

There is a tendency to treat the carriage of despatches rather as a participation in the enemy's service than as the carriage of contraband. The fact that confiscation of the ship is an incident of such carriage may have been one cause of this; but the reason usually assigned for this confiscation is rather that, otherwise, there would be no profit to the captors of such a seizure, the despatches possessing no marketable value. It is conceived that the carriage of despatches knowingly, but for hire in the general way of business, is no participation in the hostile service.

Grain. The "Commercen,"[1] a Swedish vessel, was captured on a voyage from Limerick in Ireland to Bilboa with a cargo of grain. Story J., giving the judgment of the Circuit Court of the United States in affirmation of the condemnation of the cargo by the District Court, says:—

"By the modern law of nations provisions are not in general deemed contraband, but they may become so when the property of a neutral on account of the particular situation of the war or on account of their destination. If destined for the ordinary use of life in the enemy's country they are not in general contraband, but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.

"Another exception from being treated as contraband is when the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects and destined for the enemy's use, there does not seem any good reason for the exemption; for, as Sir W. Scott observes, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.

"But it is argued that the doctrine of contraband cannot apply to the present case because the destination was to a neutral country. And it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character or however

[1] 1 Wheat. 382.

well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture when the property of a neutral."

This case was not one of contraband, but of enemy's property in course of transit to a country, neutral indeed, but harbouring the enemy's forces; and the provisions of which it consisted were admittedly going for the use of the latter. Marshall C. J., Livingston and Johnson JJ. dissented from the decision, on the ground that there was nothing improper in the Swedes' helping the enemies of the U.S.A. in their Spanish campaign against France.

Corn.

In the case of Maisonnaire *v.* Keating,[1] the vessel, captured by a French privateer, was carrying a cargo of corn from Wilmington (U.S.) to Lisbon for the use of the allied British and Portuguese armies, Great Britain being then at war with the United States. Story J., in his judgment, observes:—

"Admitting that provisions are not in general contraband of war, it is clear that they become so when destined to a port of naval equipment of an enemy, and a fortiori when destined for the supply of his army."

The question raised in the "Commercen" of course did not here arise. The capture by a French ship of British goods destined for the use of the Portuguese armies, consigned to Lisbon and travelling under a British licence, was as clearly a good capture as anything of the kind could be.[2]

Army bluchers, artillery, harness, army boots, regulation blankets.

The "Peterhoff,"[3] a case before the Supreme Court of the United States, was an appeal from a decree of the District Court of New York condemning a British ship for attempt to break blockade during the war between the United and Confederate States. The Chief Justice (Chase), in the course of his judgment, discussed what constitutes contraband as follows:—

"The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the

[1] 2 Gall., 325.
[2] See the "Julia" (*ibid.*, Vol. I, p. 594, S.C. 8 Cranch, 181) as to the effect of a belligerent licence.
[3] 5 Wallace, 28.

military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

"A considerable portion of the cargo of the 'Peterhoff' was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'Government regulation grey blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army."

In Hobbs *v.* Henning,[1] the Court of Common Pleas held that contraband goods belonging to a neutral cannot lawfully be seized unless they are in course of transit to an enemy's port; the fact that it was intended to the knowledge of the ship's master to convey them from that port to an enemy's port is immaterial. It should be observed that the Court in this case strictly adhered to the rule of "destination," and ignored or disregarded the element of "intention."

Money, plate, bullion.

In United States *v.* Dickelman,[2] the Supreme Court of the United States held that money, silver plate, and bullion when destined for hostile use, or for the purchase of hostile supplies, are contraband of war. Chief Justice Waite, in delivering judgment, made the following observations:—

"What is contraband depends upon circumstances. Money and bullion do not necessarily partake of that character; but when destined for hostile use, or to procure hostile supplies, they do."

Provisions.

The "Benito Estenger"[3] was a case of a vessel captured by a man-of-war of the United States while carrying provisions to Manzanillo, a town of Cuba, then in a state of blockade by the United States. Fuller C. J., on appeal from a District Court of the United States, after quoting Mr. Justice Story's decision in the "Commercen,"[4] and that of Sir William Scott in the "Jonge Margaretha,"[5] observes:—

"But while alluding to this subject by way of illustration, we do not feel called upon to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that, in dealing with a vessel adjudicated to have been an enemy's vessel,

[1] 17 C.B.N.S., 791.
[2] 92 U.S. Rep., 520.
[3] 176 U.S. Rep., 568.
[4] Wheaton's Reports, Vol. I, p. 382.
[5] 1 C. Rob., 189.

the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well-nigh decisive importance."

Horses. In the "Juno"[1] it was held that in a doubtful case a small unsubstantial part of the cargo, like five horses, will not be presumed, in the absence of other proof, to have been intended for military use.

This is clearly right; but, taken by itself, it suggests that the Court might have held circumstances of suspicion sufficient which would by no means have satisfied Lord Stowell.[2] However, the Court seems to have adopted a fairly rigid rule, enunciated as follows: "When a belligerent port was neither in a state of siege nor blockaded, nor, so far as I know, garrisoned, horses on board a neutral bound to that port will be *deemed* to have been intended for the purposes of peace." In fact, the peaceful character of the port is asserted to create a conclusive argument and not a mere presumption.

Tar. In the "Bird"[3] it was somewhat broadly held that, in 1779, materials for the building, equipment, and armament of ships were contraband, and that tar was such an article. The rule was also applied according to which the vessel and other innocent goods are confiscable, if belonging to the same owner as the contraband.

Coal. The "Allanton" was a British vessel captured 3 June, 1904, in the Japanese sea by a Russian cruiser. She was laden with a cargo of 6,500 tons of Japanese coal. According to the ship's papers, it appeared that in May, 1904, she delivered at Saseho a full cargo of coal from Cardiff. On discharging this cargo she proceeded to Muroran, where she embarked another full cargo of Japanese coal, destined, according to the documents, for Singapore. There was also on board the vessel a young Japanese, alleged to be on his way to America.

Having considered the case, the Prize Court of Vladivostock found that the "Allanton" was justly condemned according to the provisions laid down in sections 2, 3, 15–17 of the Russian Code of Maritime Prizes on the following grounds:—

(*a*) Irregularities in the official company's book.

(*b*) Unquestionable evidence of the steamer having previously conveyed a full cargo constituting contraband to a naval port in Japan with the knowledge and concurrence of the owner.

(*c*) The chartering of the steamer for her second voyage by a Japanese trading company, and the discovery on

[1] 38 Ct. Cl. (U.S.), 465. 1903.
[2] Cf. the "Frau Margaretha," *supra*, p. 78.
[3] 38 Ct. Cl. (U.S.), 228. 1903.

board of a full cargo of coal constituting contraband, if the real destination of the steamer was not Singapore, but an enemy's port, or even the enemy's fleet.

The Prize Court of Vladivostock thereupon adjudged that the steamer "Allanton" and the whole of her cargo were lawful prize.

The Supreme Court at St. Petersburg—Professor Martens being a member thereof—gave judgment as follows:—

"As it has been fully proved that the steamer 'Allanton,' which was detained by the Pacific cruisers, belonged to a British subject domiciled in England, and was sailing under the British mercantile flag, and consequently was a vessel of neutral nationality, the vessel and likewise her cargo would have been liable to confiscation only in such case if she had been caught in the act of conveying contraband to the enemy or to the enemy's port. Although the cargo of the steamer 'Allanton' consisted of coal, which was included in the list of contraband Imperially confirmed on the 14th February, 1904, there was nothing to prove in this case that the cargo was intended for conveyance to the enemy or to the enemy's port. On the contrary, all the documents presented proved the opposite. From these documents, the genuineness and authenticity of which cannot be doubted, it is evident that the steamer 'Allanton,' on her arrival at the Japanese port of Muroran, was chartered to convey to Singapore a cargo of coal purchased by the English firm of Paterson, Simons, and Co. in Singapore from the Japanese Coal Company Hokkaido-Tanko-Tetsudo-Kaisha. The contract for the supply of 55,000 tons of coal by the Japanese Company to the firm of Paterson, Simons, and Co. in Singapore was concluded in December 1903, i.e. before the declaration of war and the commencement of hostilities against Russia by Japan. The charter-party and the bill of lading for the said cargo were forwarded to Paterson, Simons, and Co., of Singapore, in due course. The correspondence between the firm of Paterson, Simons, and Co. and their representatives in Japan, Dodwell and Co., and between the latter and the Hokkaido-Tanko Company, also the correspondence between the shipowner Rea and the captain of the 'Allanton,' Motyer, fully confirms the actual destination of the coal carried by the steamer to be the port of Singapore. This is also confirmed by the freight contracts for future contemplated voyages of the steamer 'Allanton,' which was to have sailed from Singapore with a cargo to Calcutta, from thence to Kurrachee, and finally to European ports.

"The fact of the steamer 'Allanton' having embarked a cargo at an enemy's port and from a Japanese Company cannot serve as sufficient grounds for confiscation, inasmuch as, if the Japanese Company be considered the owners of the cargo previous to its delivery to the holders of the bill of lading, it would yet not be liable to confiscation in virtue of Article II of the Maritime Prize Regulations, which provides that a neutral flag covers an enemy's cargo provided that it is not contraband, whereas coal could be recognized as contraband only in such case if it were being conveyed to the enemy or to an enemy's port, which was not so in the present case. The circumstance which, in the first instance, led to the surmise that the cargo of the steamer 'Allanton' was destined for

delivery to the enemy, or to an enemy's port, are removed by virtue of the documents submitted at the trial of the case in the Supreme Prize Court, and have no definite effect.

"The delivery by the 'Allanton' on her first voyage of a cargo of Cardiff coal to the Japanese port of Saseho cannot serve as sufficient ground for the confiscation of the cargo subsequently shipped from Muroran to Singapore, as, in virtue of Article XI of the Prize Regulations, vessels of neutral nationality are liable to confiscation only in the event of their being caught in the act of conveying contraband to the enemy or to an enemy's port, and by no means if they had on a previous occasion carried contraband to the enemy.

"The route which was taken by the steamer 'Allanton' from Muroran has been accepted as the shortest, as also the statement of Captain Motyer to the effect that, in carrying coal not as contraband, but to a neutral port, he had no cause to fear detention of the vessel. Although, according to the decision of the Chief Hydrographic Department, the majority of vessels prefer the ocean route, owing to frequent fogs which occur in the Japanese Sea making it dangerous for navigation, but as it would appear from this decision that some vessels nevertheless take the route across the Japanese Sea, the route taken by the captain of the 'Allanton' cannot serve as evidence against him. The discovery on board the vessel of the Japanese Tateki Miahara, if there had been any cause for suspicion in the beginning, in view of his possessing no documents establishing his identity, this suspicion is now removed, as on further investigation of the case it was not proved that he had acted as agent for the enemy's Government, or had been entrusted with the delivery of the cargo of coal. The omission of entries in the official log-book from the 15th May, 1904, although an infringement of the Regulations for keeping log-books, is yet insufficient for disqualifying the evidence brought forward in regard to the steamer having been directed to Singapore, more especially as the entries in the other ship's log were properly made.

"Admitting, on the foregoing grounds, that the steamer 'Allanton' and her cargo were not liable to confiscation, the Supreme Prize Court, guided by Article XXX of the Prize Regulations Imperially confirmed, then considered the question as to whether there were sufficient grounds for the detention of the steamer 'Allanton' and her cargo, and whether the established conditions and rules were observed on such detention. The Supreme Court found that there were in every respect sufficient grounds for suspicion that her cargo was destined for the enemy or for the enemy's port. This suspicion was based on the following:—

"(1) That the vessel did not stop on the first request of the cruiser 'Rossia,' but only after two blank shots had been fired. Although Captain Motyer denied this, and referred to witnesses whom he requested to be examined, the Court considered the Protocol drawn up on this subject in the established form, and confirmed by the sworn depositions of the Commander of the cruiser 'Rossia,' to be thoroughly trustworthy.

"(2) That the official log-book was not kept in the proper form. If the irregularity, as shown above, cannot serve as sufficient grounds for the confiscation of the vessel, it still gave rise to suspicion on her detention.

"(3) That the cargo was received by the vessel at an enemy's port, and that she had a Japanese on board who could not establish his identity.

"(4) That the steamer adopted a course seldom chosen by ship captains, and passed close to the enemy's ports and the enemy's fleet.

"(5) That previous to this the steamer delivered contraband to an enemy's port.

"All these circumstances, although subsequently proved at the trial of the case at the Supreme Prize Court in favour of the shipowner, made the vessel, on her meeting with the Russian squadron, a suspicious case, and gave the Admiral in command of the squadron the right of detaining her, in accordance with Article XVI of the Prize Regulations, and Articles XXXVI and XXXVII of the 'Instructions for the Order of Stoppage, Inspection, and Detention of Vessels and cargo.' The detention of the steamer 'Allanton' and her cargo was carried out with the observance of the conditions and rules established in Articles XV–XXVI of the Prize Regulations and of the Instructions confirmed by the Admiralty Council on the 20th September, 1900. Wherefore the detention of the steamer 'Allanton' and her cargo must be admitted to have been carried out on sufficient grounds, and with the observance of the established conditions and rules.

"On all these grounds the Supreme Prize Court decided :—

"(1) To recognize the steamer 'Allanton' and her cargo as not subject to confiscation, and to return the steamer and the cargo to their owners;

"(2) To recognize that the steamer 'Allanton' and her cargo had been detained on sufficient grounds and with the observance of established rules; and

"(3) That the decision of the Prize Court of the port of Vladivostock shall be annulled as regards the confiscation of the said steamer and cargo.

"The original bears the necessary signatures.

"Correct.

"Acting Secretary,

"(Signed) R. SOURIN."

The judgment of the Vladivostock Court was annulled on the ground that, although coal was contraband according to the declaration of the Russian Government, yet it was only contraband when being conveyed to the enemy or the enemy's port, and all the documents in the case proved the contrary. Further that, although the cargo seized was embarked at an enemy's port and by a Japanese subject, yet, being under a neutral flag and not contraband, it was protected; and finally, that although on her previous voyage she had carried contraband to Japan, such fact did not affect her subsequent voyage to Singapore, which was lawful.

The decision of the Court that the steamer had been detained on sufficient ground is open to severe criticism. The fact that the cargo was received at an enemy's port is wholly immaterial, as trade by neutrals with a belligerent in goods other than

contraband, and in the absence of blockade, is absolutely legitimate; nor would the presence of a subject of the belligerent State other than an envoy or military or naval person constitute a proper ground for detention of the ship. Neither is the fact that the vessel was going a somewhat unusual course, if that be conceded, an adequate reason for detention; a neutral ship ought not to be molested because she is in strange seas; she is free to go where she likes, unless there be from the ship's papers or from admissions of her crew, adequate proof that her destination was illegal, or unless her course be inconsistent with any but the same conclusion. The fifth ground alleged as justification for detention, namely, that "previous to this the steamer delivered contraband to an enemy's port," is wholly unsupported by precedent or authority, and if it were to receive general acceptation would place neutral shipping at the mercy of the speculations or suspicions of a naval officer.

The only plausible reason for justification of the vessel's seizure and detention may perhaps be found in the alleged irregularity in the vessel's log. Lord Stowell, indeed, insisted upon the high importance that ought to be attached to regularity in a ship's books or other papers, and anything approaching the character of fraud in these matters has always entailed very serious consequences. It may certainly be doubted whether in the case of the "Allanton" there was such irregularity in the log-book as to warrant the detention of the ship; but however that may be in fact, there can be little question that irregularity in a ship's papers does constitute a legitimate ground for detention.

The "Calchas"[1] was a British steamer, and at the time of her capture near the bay of Tôkiô was proceeding on a voyage to Liverpool via Yokohama, Kobe, Shanghai, and Hong-Kong, and her cargo consisted of flour, cotton, wooden logs, machinery, and various other goods consigned partly to neutral and party to Japanese ports. Besides these goods, 122 mailbags were found on board addressed to Japan and Corea.

By a decision of the 31st August, 1904, the Vladivostock Prize Court adjudged:—

"(1) That the goods destined for ports in Japan, and consisting of 13,300 bags of flour, 36 bales of cotton, and 97 wooden logs, be confiscated as lawful prizes.

"(2) That the goods consigned to neutral ports be regarded as not liable to confiscation, and be immediately released and restored.

[1] See "Times," 11 October, 1904. The judgment above given in the case of the "Allanton" is from an official translation.

"(3) That the steamer 'Calchas,' captured in the act of carrying contraband for the enemy, comprising less than half the total cargo on board at the time of capture, and mails for the Japanese Government having no direct influence on the prosecution of warlike operations, be likewise released."

On 2 May, 1905, the Supreme Prize Court, on which Professor Martens sat, sitting at St. Petersburg, gave judgment as follows:—

"Having heard at the present sitting the verbal explanations of Advocates Scheftel and Berlin and the conclusions of the Acting Procurator, the Supreme Prize Court found that the decision of the Vladivostock Prize Court in this case was appealed against only in respect of the confiscation of 13,300 bags of flour, 97 logs, and 36 bales of cotton. The protest of the Procurator of the Vladivostock Prize Court and the complaint of the Commander of the separate detachment of cruisers of the Pacific squadron referred to the release of the steamer 'Calchas' and to the postponement of the execution of the judgment delivered by the lower Court in respect of the parts of machinery found on board the 'Calchas.' The question respecting the ultimate destination of the parts of machinery with regard to which the Vladivostock Prize Court passed no judgment is not subject to consideration by the Supreme Prize Court. But the decision of that Court releasing the steamer 'Calchas' is protested against by the Procurator of the Vladivostock Prize Court and the Commander of the separate detachment of cruisers of the Pacific squadron.

"In accordance with Article VII of the Rules of the 14th February, 1904, 'the following acts, forbidden to neutrals, are assimilated to contraband of war: the transport of the enemy's troops, of the enemy's despatches and correspondence, the supply of warships and transports to the enemy. . . . Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be seized, and even confiscated.' There can be no doubt that a neutral, having undertaken to transport the enemy's troops, despatches, and correspondence, to a certain extent enters the service of the enemy's country and openly meddles in warlike operations. The motives for so meddling may be attributed either to pecuniary advantages, political sympathy, or force of circumstances. The right, however, of confiscation by a belligerent is incontestable with regard to a neutral vessel which has thus come under the flag of the enemy. But this right of confiscation by a belligerent in respect of a neutral subject or vessel exists only when the circumstances of the case prove that there can be no doubt of the culpability of the neutral, i.e. when it can be established that the neutral was actually engaged in the transport of the enemy's troops, despatches, and correspondence. It would be necessary to prove that the neutral had undertaken to transport such troops or despatches and correspondence to the enemy's country or enemy's Government; it would be necessary to ascertain positively the intention of a neutral to render services to a belligerent in the prosecution of warlike operations on land and sea. According to these views, a neutral vessel engaged by an agent of a belligerent Power for the special purpose of carrying despatches addressed to military, naval,

and diplomatic authorities may legally be arrested and condemned if the fact of the engagement be proved. But the carriage of ordinary correspondence from neutral ports would, in accordance with the Règlement of the Universal Postal Union, alone be insufficient ground for regarding a neutral culpable of rendering assistance to one of the belligerents to the injury of the other.

"It is in this sense that the literal and inward meaning of Article VII of the Rules of the 14th February, 1904, must be understood. This legislation could have no intention of abolishing the acknowledged privileged rights of mail-steamers, or of annulling the Regulations established by the Universal Postal Union for the benefit of all nations. These Regulations remain operative without interruption during war-time, and, so far as it is practically possible, even between the belligerents. Thanks to the Universal Postal Union, The Hague Peace Conference of 1899 was able to adopt a Resolution greatly alleviating the condition of prisoners of war by providing for the transmission by post and by railway, free of charge, various parcels and correspondence addressed to them. During the course of the present war, Russian and Japanese inquiry offices for prisoners of war have maintained, with the approval of the Governments of both belligerent Powers, direct and constant communications with one another by post and telegraph.

"In view of the foregoing, no blame can be attached to the captain of the 'Calchas' for having received at Tacoma 122 mail-bags for delivery at neutral, Japanese, and Corean ports on the route. He could not know the contents of these sealed bags, nor could he be held responsible for the contents of the correspondence contained in them given to him by the postal authorities of the United States.

"On the other hand, the Vladivostock Prize Court had legal right to acquaint itself with the contents of these bags, and to seize the correspondence addressed to the Japanese Government or Japanese Government institutions and officials. The Prize Court acted accordingly, and retained only fifteen packets addressed to the Japanese Government in Tôkiô. All the remaining correspondence was forwarded to the Staff of the Commander of the fleet, and proper steps were then taken for the transmission of the correspondence to its destination.

"On perusal of the packets in question with Government correspondence, it appeared that only two contained reports from the Japanese Minister in Washington and Japanese Consular Agents abroad which were of a political nature. One contained a report from the Japanese Minister, Takahira, to the Minister for Foreign Affairs in Tôkiô, enclosing two Secret Papers, Nos. 30 and 31; the other was a report from the Japanese Consul-General in San Francisco. Other despatches referred to domestic affairs, cash accounts, and the general management of Japanese Diplomatic and Consular offices in America and Europe. Although these reports were certainly of political interest, they contained, however, no information likely to influence the progress of the operations of our army and fleet.

"In view of these circumstances, there are no grounds upon which Article VII of the Rules of the 14th February, 1904, could be applied to the steamer 'Calchas' or for regarding her captain culpable of carrying to the enemy so-called 'analogous' contraband of war, i.e. the enemy's despatches and correspondence. The steamer 'Calchas' is not liable to

confiscation for carrying correspondence to the enemy, and the guarantee lodged by the owners and supported by the Bank of England for the sum of 674,830 roubles for the preliminary release of the steamer on bail in November, 1904, must be regarded as cancelled.

"But, on the other hand, there can be no doubt that, on discovering a considerable number of bags with mails on board the steamer 'Calchas' addressed to the enemy's port, the Russian cruiser 'Gromoboi' was legally justified in arresting the steamer and suspecting the neutral character of her cargo. In this respect the Commander of the cruiser 'Gromoboi' was not only justified, in virtue of Article VII of the Rules of the 14th February, 1904, and of the Laws relating to prizes (Article XIII) and the Instructions (Article XXXVI), but he was compelled under those Regulations to give orders for the conveyance of the steamer 'Calchas' to Vladivostock to be handed over to the local Prize Court.

"Finally, taking into consideration that the arrested steamer was discovered with an enormous cargo which might, according to circumstances, either be regarded as absolute or conditional contraband of war, her detention and conveyance to Vladivostock was perfectly justified in accordance with facts and indisputable rights of belligerent ships.

"On the strength of these views, the Supreme Prize Court recognizes that there were sufficient legal grounds for the arrest of the steamer 'Calchas' and for her conveyance to Vladivostock as ordered by the Commander of the separate detachment of cruisers of the Pacific Squadron. The arrest and her conveyance to Vladivostock were carried out with the observance of all the principles of Russian and international law.

"Reverting now to the examination of the other parts of the cargo regarded by the Vladivostock Prize Court to be contraband of war and against which appeals have been made, the Supreme Prize Court firstly considered the case of the 13,300 bags of flour which was regarded contraband of war liable to confiscation. In its decision in the case of the 'Arabia,' of the 20th November, 1904, the Supreme Prize Court had occasion to explain, in interpreting Article VII, section 10, of the Rules of the 14th February, 1904, the necessity of making a distinction between unconditional (absolute) and conditional (relative) contraband of war. In view of this interpretation, the articles enumerated in section 10 of the said Article of the Rules are deemed to be contraband of war only if transported on the account of, or destined for, the enemy, i.e. when transported to the enemy's Government, contractors, army, navy, fortresses, or naval harbours, and not for private individuals, subjects of the enemy's country, and more especially neutral Governments or private individuals. In every concrete case it must be determined from all the circumstances available to what extent the arrested objects can be assimilated with those constituting contraband of war or with those which, on special evidence produced to the Court, leave not the slightest doubt that they belong to private individuals not acting on behalf of, or for account of, the enemy. In all such cases, according to the practice of Prize Courts existing for many centuries, the onus of proof would undoubtedly lie with the individual seeking recognition of the irregular detention and release of the vessels and cargoes arrested on suspicion.

"In applying these principles to the parcel of flour consisting of 13,300 bags confiscated by the decision of the Vladivostock Prize Court,

the Supreme Prize Court find, from the documentary proof produced by the parties, that this flour, ordered by a neutral firm in Japan, was not destined for the Japanese Government, army, navy, or fortresses, but consigned to the English firms of Findlay, Richardson, and Co., Gill and Co., and Samuel, Samuel, and Co., and is consequently not liable to confiscation. In view of this, the Supreme Prize Court, guided by Article VI, section 10, of the Rules of the 14th February, 1904, and Articles XII and XIII of the Laws relating to prizes, decided to reverse in this respect the judgment of the Vladivostock Prize Court, and consequently countermand the confiscation of the 13,300 bags of flour above referred to as a lawful prize.

"From the foregoing views, the Supreme Prize Court, on the contrary, recognizes the 36 bales of cotton and the 97 logs as lawful prizes liable to confiscation in accordance with the decision of the Vladivostock Prize Court.

"In virtue of the Imperial Order of the 18th April, 1904, cotton was added to the list of objects declared contraband of war, apparently in view of the possibility of utilizing it for the manufacture, by chemical process, of pyroxyline and other explosive substances.

"It would appear from the details of this case that the parcel of cotton in question was consigned to two Japanese firms in Kobe—Nagai Wata Kaisha, and the Japanese Cotton Trading Company. It is also known that in Osaka, near Kobe, the manufacture of cotton for various purposes has developed enormously, and that a large military arsenal exists.

"In virtue of Article VI, section 3, of the Rules of 14th February, 1904, are liable to confiscation as contraband of war 'articles or materials for causing explosions, such as torpedoes, dynamite, pyroxyline.' Finally, no positive proof has been submitted to the Supreme Prize Court by the representatives of the above-mentioned firms in support of the absolutely innocent character of the parcel of cotton consigned to Kobe.

"In view of these considerations, the Supreme Prize Court decided to support the decision of the Valdivostock Prize Court, in accordance with which the above-mentioned 36 bales of cotton were recognized as lawful prizes and liable to confiscation. Finally, with regard to the 97 logs, the Supreme Prize Court finds that in virtue of Article VI, section 9, of the Rules of the 14th February, 1904, materials of all kinds suitable for the installation of telegraphs, telephones, and for the construction of railroads are deemed to be contraband of war and liable to confiscation. The logs found on board the steamer 'Calchas' can be utilized for warlike requirements, and are therefore liable to confiscation.

"On the strength of all the foregoing views, the Supreme Prize Court decided (1) to leave the protest of the Procurator of the Vladivostock Prize Court and the complaint of the Commander of the separate detachment of cruisers of the Pacific squadron without consideration; (2) to reverse, in respect of the appeals of the representatives of the owners of the cargoes, the decision of the Vladivostock Prize Court in so far as it concerned the confiscation of 13,300 bags of flour, and to restore the flour to the owners. The other questions referred to in the appeals to remain without consideration; (3) to recognize that the steamer 'Calchas' was detained on sufficient grounds and with the observance of all formalities.

"R. JURSHU,
"Acting Secretary."

CHAPTER II

BLOCKADE

BLOCKADE is a proceeding of a naval character, having for its object the interdiction by force of all intercourse by sea between the blockaded littoral, its ports, havens, estuaries, and rivers, and the rest of the world. A siege differs from a blockade in that a siege necessarily involves the notion of attack and ultimate capture by means of siege works or assault.

A pacific blockade is a demonstration of a belligerent character short of actual hostilities against an offending State, whereby its commerce is suspended, but in accordance with the precedents generally established by modern usage and the views of most jurists, should not extend to interference with the commerce of neutrals proceeding to or from the offending State.

The purpose of blockade is, primarily, by depriving the inhabitants of the hostile State of all commercial intercourse by sea with the rest of the world, and thus subjecting it to privation, to coerce it to seek peace on terms acceptable to the other belligerent.

The serious injury inflicted upon neutral States through being thus shut off from commerce with a State upon which they are on terms of amity, has from early times constrained them to insist upon certain rules and observances as conditional to their recognition of a blockade as being effective and binding upon their subjects. As in the case of contraband, so in that of blockade: its claim for recognition by neutral States is founded upon the principle that when sovereign States are at war they are entitled to choose the means and methods of war they may employ against each other, and that no neutral nation has a right so to act as to render such means or methods ineffective. There are, indeed, some publicists who insist that blockades are entitled to special favour, inasmuch as they constitute an effective means of carrying on war without effusion of blood. Cauchy felicitously describes them as "un moyen de forcer l'ennemi à se rendre sans le détruire,"[1] and certainly the progress of international law has

[1] Cauchy, Vol. II, p. 196.

not been in the direction of unduly limiting the rights of belligerents to impose blockades upon their enemies' ports or territory.

Much controversy has taken place concerning the origin of this undoubted right of belligerents to prevent neutrals carrying on trade with ports or places which are blockaded. Some jurists contend that blockade is founded on the right of conquest, others upon necessity. Hautefeuille[1] thus expounds the theory of conquest as the basis of blockade :—

"Pour arriver à ce résultat, il faut necessairement s'emparer des villes, des forteresses, des ports, et le plus souvent il faut battre les murailles avec le canon et enlever la place de vive force, ou reduire ses défenseurs par la famine, c'est à dire faire le siège ou le blocus. Le droit du belligerant à employer ces moyens est parfait et absolu; c'est un droit essentiel de la guerre."

He goes on to observe that when a belligerent besieges or invests a town or fortress, he occupies with his troops the circumjacent territory, the possession and occupation of which affords him the same rights against others and the same jurisdiction as if the territory were part of his own country :—

"Si nous faisons," he continues (p. 3), "l'application de ces principes au blocus maritime, nous voyons que, du moment qu'un belligérant a bloqué un port de son adversaire, il a fait la conquête de cette partie du domaine ennemi que nous avons appelé mer territoriale, qu'il a le droit de donner à cette conquête les lois qu'il trouve les plus propres à favoriser ses projets. . . . Pour le belligérant ce droit est aussi complet que celui en vertu duquel il peut défendre aux étrangers de faire le commerce en général ou certain commerce special dans ses anciens États. Il peut donc non seulement promulguer la prohibition, mais encore décréter la peine applicable à ceux qui voudraient enfreindre cette loi, parce que le lieu dans lequel se passe le fait est soumis à sa juridiction. Le droit de blocus a donc sa source dans la loi primitive ou divine; mais comme on le sait, son origine est complètement différente de celle de la première restriction à la liberté du commerce neutre. La contrebande de guerre dérive d'un effet d'un devoir naturel des peuples neutres; le blocus découle d'un droit du belligérant."

This doctrine of conquest is undoubtedly open to objection, for the control of territorial waters is properly based upon the control of the territory to which these waters are appurtenant, and inasmuch as a blockade necessarily involves the fact that the territory is not in the occupation of the belligerent who maintains the blockade, this essential characteristic of sovereignty over territorial waters is absent. Nor can Hautefeuille's picture of substituted sovereignty explain the belligerent's undoubted right to interfere with neutral shipping far beyond the limits of territorial waters.

[1] Hautefeuille, "Des Droits et Devoirs des Nations Neutres," Vol. III, p. 1.

A more correct view of the principle upon which the right of blockade exists may be found in the view that the attempt to reduce an enemy to subjection by cutting off his commercial relations with the rest of the world is a proper and legitimate form of warfare, and that consequently there is a duty imposed upon every neutral State not to render that form of warfare ineffective or impossible.

Gessner thus deals with this theory, affirming that blockade is founded upon necessity, and that without it maritime wars would be rendered impossible :—

"Le droit de blocus ne pouvant, comme le fait très bien remarquer Hautefeuille, se déduire des devoirs des neutres, nous sommes forcés, malgré l'opposition ardente de cet auteur, d'en chercher la cause dans la nécessité. Il nous suffit que cette nécessité ne soit pas seulement prétendue; surtout qu'elle ne soit pas prétendue par une seule nation, comme cela a été le cas pour beaucoup de mesures prises à l'égard des neutres pendant les guerres maritimes. La nécessité d'interdire aux neutres le commerce avec les ports bloqués, si l'on ne veut pas faire perdre toute son efficacité au blocus, au moyen le plus important d'arriver par la guerre maritime à des resultats et d'accélérer le rétablissement de la paix, cette necessité a toujours été reconnue par toutes les puissances et cette necessité n'a fait naître d'aucun côté des réclamations de quelque importance. La necessité d'accorder aux belligérants un pareil droit est donc suffisamment constatée; ce fait et la sanction historique qu'il à reçue suffisent pour donner au droit de blocus une base solide. Toutes les autres thèories sont dépourvues de fondement; le point de vue que nous venons d'exposer et qui a été celui de plusieurs anciens auteurs, de Grotius, de Bynhershoek, de Vattel et aussi parmi les modernes de Cauchy, est le seul défendable."[1]

Whatever indeed may be the theory of blockade, whether it be founded on the somewhat fanciful notions of "conquest" or "occupation" of territorial waters, or may be ranged under the stern law of necessity, it has long become a well-understood part of the law of nations, and is regarded by mankind as a necessary incident of maritime war. Grotius thus deals with the right of a belligerent to prevent the access of a neutral ship carrying supplies to a blockaded port or besieged town :—

"Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi et dominium earum debiti consequendi causa quæri poterit."[2]

[1] Gessner, p. 168.
[2] Grotius, "De Jure Belli et Pacis," lib. III, chap. I, sec. v, 3.

Bynhershoek[1] deals at length and with some care with the duties of neutrals and rights of belligerents in the case of sieges and blockades :—

"Ex ratione communi et gentium usu urbibus obsessis nihil quicquam licet advehere . . . Sola obsidio in causa est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria. Si quid eorum, quibus indigent, tibi adferre liceret, ego forte cogerer obsidionem solvere, et sic facto tuo mihi noceres, quod iniquum est. Quia autem sciri nequit, quibus rebus obsessi indigeant, quibus abundent, omnis subvectio vetita est, alioquin altercationum nullus omnino esset modus vel finis. Hactenus Grotii sententiæ accedo, sed vellem ne ibidem addidisset tunc demum id verum esse 'si jam deditio aut pax expectabatur' et mox, eum, qui sic tamen subvexit, 'teneri de damno culpa dato,' vel 'si damnum nondum dederit, sed dare voluerit, jus esse rerum retentione eum cogere, ut de futuro caveat obsidibus, pignoribus aut alio modo.' Vellem, inquam ne hæc addidisset Grotius, nam nec rationi conveniunt nec pactis gentium, quæ mihi succurrerunt. Quæ ratio me arbitrum constituit de futura deditione aut pace? Et si neutra exspectetur, jam licebit obsessis quælibit advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere vel quoquo modo deteriorem facere. . . ."

"Quod in urbibus vere obsessis obtinet, et ad castra, quasi obsessa, idonea ratione translatum est, pertinet quoque ad portus hostiles, qui navibus cincti pro obsessis habentur. Illustre in hanc rem est decretum ordinum generalium 26 Jan. 1630 factum ad consultationem admiralitatis Amsterdammensis, ex ejusdem et aliarum admiralitatum consilio, quin et, ut probabile est, ex consilio privatorum quod exstat *Consil. Holl. T.* V. Consil. 161."

Vattel[2] declares with considerable precision the rules of international law with regard to blockades and sieges :—

"All commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it (ou seulement bloquée), I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged without my leave, for he opposes my undertaking and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war. King Demetrius hanged up the master and pilot of a vessel carrying provisions to Athens at a time when he was on the point of reducing that city by famine.[3] In the long and bloody war carried on by the united provinces against Spain for the recovery of their liberties, they would not suffer the English to carry foods to Dunkirk, before which the Dutch fleet lay."

The attitude which is now authoritatively assumed by all States is that no blockade will be treated as binding on neutral Powers,

[1] "Quæst. Juris Publici," lib. I, chap. XI, p. 212.
[2] "Droit des Gens," lib. III, sec. 117.
[3] Plutarch in "Demetrius."

unless the same be effectively maintained. Klüber accurately states the modern conception of an effective blockade :—

"On appelle lieu *bloqué* que ce soit un port, une place forte, une ville, un camp, une côte, etc., celui où en vertu des dispositions de la puissance qui l'attaque avec des troupes, ou avec des vaisseaux stationés et suffisamment proches, l'on ne peut entrer d'aucun manière sans le consentement de cette puissance, ou dans lequel on ne peut pénétrer qu'en courant un danger évident. Un lieu pareil dans les limites où s'etend le blocus, par exemple, un port du côté de la mer, doit être regardé par les neutres comme étant au pouvoir de la puissance belligerante qui le tient bloqué. Cette puissance est donc en droit d'exclure à volonté les états neutres et leur sujets de tout commerce, soit navigation, soit commerce proprement dit, avec ce même lieu." [1]

Bluntschli,[2] while pointing out the impracticability of laying down any rule as to the number of ships, batteries, or guns necessary to render a blockade effective, suggests that each case must be determined by its own particular facts and circumstances, and observes

"Il faut que l'ennemi possède sur les lieux des forces suffisantes pour pouvoir intercepter le commerce régulier des navires marchands."

It is obvious that neutral States would not recognize the right of a belligerent State to deprive them of their commercial relations with its enemy merely by the pronouncement of an interdiction of commerce. Later on we shall show that such pretensions have been raised, but they have uniformly been strenuously resisted by neutral States, and have now, apparently, been definitely abandoned. The modern conception of a neutral's responsibility in relation to blockade is well stated by Dupuis.[3] After pointing out that belligerents recognize as a condition precedent to their right to interfere with neutral commerce, that they should mount guard over the hostile coast, and effectually bar the approach thereto, he observes :—

"On ne leur demandait plus qu'une chose entierèment conforme aux devoirs de la neutralité : respecter les operations de guerre, s'abstenir de franchir des lignes d'investissement, éviter d'entrer en conflit avec la force armée qui pressait l'ennemi, éviter en un mot de faire acte d'hostilité contre les auteurs du blocus au profit de l'ennemi bloqué. Les neutres n'avaient qu'à s'incliner devant la force effective."

There is undoubtedly among European jurists a prevalent view that to entitle a belligerent to enforce the penalties of violating a blockade against neutrals, the blockade must be of so strict a

[1] "Droit des Gens," sec. 297.
[2] Bluntschli, "Droit International," sec. 829.
[3] "Droit de la Guerre Maritime," p. 181.

character as to render access to the blockaded area impossible, or at least of such a character as to expose vessels attempting to pass to the effective fire of guns placed in position. Ortolan,[1] in the case of the blockade of a harbour, insists that all its approaches should be so guarded by permanent naval forces that no ship seeking access should be able to do so without the blockading force seeing and being able to turn her back. Ortolan, indeed, purports to base this proposition upon the opinion of Klüber, but this jurist also speaks of a "*danger évident.*" Moreover, it may be observed, that if M. Ortolan's definition of an effective and therefore legal blockade were to obtain, blockades over an extensive littoral would never reach that standard of effectiveness, and would not therefore be legally possible. Probably, for all practical purposes, we may properly accept the following definition of MM. Pistoye and Duverdy :—[2]

"Nous poserons en principe que, pour qu'il y ait blocus, il faut que la place soit investie par des forces suffisantes pour en rendre l'entrée périlleuse aux navires qui voudraient s'y introduire. Ainsi tout blocus doit être réel et effectif."

It would be unprofitable to discuss at length the somewhat conflicting views of European jurists as to what constitutes a blockade properly recognizable by neutral States. It can scarcely be doubted that the views of Great Britain and America, as expressed in the declarations of their statesmen and the judgments of their Courts, as to the conditions essential to an effective blockade, are those which would generally govern the action of belligerents, namely, that the blockade must be maintained by a force sufficient to render ingress to and egress from the place blockaded a matter of appreciable danger to the vessel attempting it.

Whether or no a blockade is effective is a matter of fact to be decided according to the circumstances and conditions pertaining to the case in question; and by "effective" it is not meant that the investment or blockade should be unbroken by any circumstance or event, such as a storm which might disperse the cruisers, or the pursuit of a hostile ship, which might cause the blockading vessels to be temporarily absent from their stations, so that a ship might find opportunity with impunity to enter the interdicted area.

[1] "Diplomatie de la Mer," Vol. II, p. 328: "Cette definition de Klüber, ecrivain de l'école positive, est le resumé des principes avoués par tous les publicistes et sanctionnés par les traités. Il en résulte que le blocus maritime d'un lieu quelconque n'est effectif qu'autant que l'investissement de ce lieu est complet et réel du côté de la mer; qu'autant que toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné."

[2] "Traité des Prises Maritimes," Vol. I, p. 365.

Bluntschli thus criticizes with great judgment and moderation the extreme view of what constitutes an effective bockade :—

"Il faut se mettre en garde contre deux extrêmes. Les uns admettent que pour que le blocus soit réel et effectif, il faut que les forces ennemies soient suffisantes pour intercepter d'une façon absolue le commerce avec la place bloquée, et declarent le blocus non effectif, si un seul navire parvient à forcer le blocus sans être remarqué et capturé : c'est demander l'impossible. L'autre opinion extrême va trop loin dans le sens inverse et déclare le blocus effectif lorsqu'un croiseur a réussi à empêcher quelques navires de passer."

Calvo thus states the modern practice as to what may be regarded as an effective blockade :—

"Dans la pratique, les nations maritimes paraissent avoir adopté un terme moyen. La capture accidentelle d'un navire neutre par un croiseur ne suffit pas pour rendre un blocus effectif, il faut qu'il y ait évidence, réalité d'un danger à essayer de forcer les croisières. Par contre, le blocus ne cesse pas d'être effectif parce que exceptionellement, un ou deux navires sont parvenus à eluder la vigilance des forces bloquantes et à en franchir la ligne sans encombre."[1]

In 1798, Sir. W. Scott laid down in the case of the "Betsy"[2] that the blockade must be such as to constitute a danger to vessels attempting to enter the interdicted port, and in this judgment, without giving full recognition to the declaration of the armed neutrality of 1780 that the cruisers must necessarily be stationary, he indicated that in the view of the Court of Admiralty the blockading ships be so near together as to render it dangerous for a vessel to attempt exit or entrance.

In 1799, however, the doctrine of a real or sensible danger to a ship attempting to enter or leave the place blockaded was seriously impaired by a judgment of the same judge in the case of the "Neptunus." In this judgment he laid down in substance that a general notification of the establishment of a blockade releases the belligerent from the necessity of that vigilant and strict maintenance which would be necessary in the case of no such general notification having taken place. It is true that Sir W. Scott guards himself from laying down that the blockade may be deliberately interrupted or discontinued, and yet remain *de jure* a good blockade until notification of discontinuance; but he undoubtedly applies a less severe test of effective maintenance to the case of a blockade accompanied by public notification than to that where such notification should be absent.

This judgment touched a question which has been the constant

[1] § 2843. Cf. Geipel *v.* Smith, L.R. 7 Q.B. 410, per Cockburn.
[2] *Vide infra*, p. 199.

subject of sharp controversy between British and continental jurists, viz. whether a general notification of blockade by the public authorities of a belligerent State is sufficient to satisfy the reasonable demands of neutrals, or whether a special notification should be made to vessels seeking to enter the forbidden area.

In 1800, Russia and Sweden embodied in a treaty the substance of the former declaration of the Armed Neutrality made in 1780, but with slightly more particularity and precision. They declared that the state of blockade, to be effective, must be such that "entrance is evidently dangerous on account of the sufficient proximity to each other of the blockading vessels."

In 1807 we find Great Britain yielding to the remonstrances of the United States as to illegal captures during the blockade by her of Martinique and Guadeloupe,[1] and it is interesting to note that Great Britain, in yielding to the American demands, gives diplomatic sanction to the principle that blockade can alone be regarded as effective if it be sufficiently strict to render the access of vessels to the interdicted ports a matter of imminent danger.

The extravagant pretensions of France in 1806 to place the whole of the British territories in a state of blockade, succeeded by a counter declaration by Great Britain placing French territory in a similar situation, is outside the serious consideration of the law of blockade, for it is evident that the main condition precedent of a lawful blockade was absent, in that no effective blockade *de facto* could possibly have been maintained in either case.

On the occasions of the blockade of the Black Sea littoral in 1855 and the Chinese coast in 1857, by Great Britain, she embodied in her notifications of these blockades a statement that they would be maintained by a "competent force," and it may be doubted whether the distinction drawn by Sir W. Scott between a blockade in fact only and a blockade in fact accompanied by notification any longer exists so far as to impose in the latter case less vigilance upon the part of the blockading force.[2]

Two modern instances are afforded of Great Britain's disposition to insist upon the effective maintenance of a blockade as an essential condition of its validity. In 1884 France published a notification of the blockade of Formosa, and Great Britain lodged a protest through her Ambassador at Paris on the ground that the blockade was ineffective; again, in 1888, the British Government intimated to the Government of Hayti that her blockade of certain ports within her own territories, occupied by insurgents,

[1] *Vide infra*, p. 124.
[2] The "Franciska," *vide infra*, p. 226.

could no longer be respected, on account of the absence of a sufficient force.

One of the most remarkable blockades in history was that of the Confederate States seaboard during the American Civil War of 1861. The coast line over which the blockade extended was over 3000 miles in length, but its recognition by the neutral Powers was made without much demur, for though in its inception it hardly amounted to more than a paper or Cabinet blockade, there was adequate assurance that the naval resources of the United States would render it effective—as, in fact, they ultimately did.

During the Russo-Japanese war, 1904–5, some question arose as to whether Japan adhered to the rules embodied in the Declaration of Paris which require *inter alia* that a blockade should be effective,[1] but it would seem from a statement made by Baron Suyematsu, who may be supposed to have written with the authority of his Government, that Japan adhered to those rules in their entirety.[2]

As a condition precedent to the validity of a blockade according to the general consensus of opinion of jurists and the practice of nations, there must be a notification thereof published by the belligerent Power establishing the blockade.[3]

The purpose of notification is obvious, namely, that merchants should have timely warning of the existence of a blockade, and may thus abstain from sending vessels laden with merchandise on a fruitless errand, or, may be, to suffer the penalty of confiscation by the Prize Court of the belligerent.

While there is this general agreement as to the necessity of a notification to render a blockade valid and legitimate against neutrals, there is a remarkable divergence of opinion as to whether this public notification is also sufficient to justify captures of vessels seeking entrance to or exit from the blockaded area.

Great Britain has generally, though by no means uniformly, treated a diplomatic notification as sufficient advertisement of a blockade to fix with knowledge and render liable to penal consequences all neutrals seeking access to interdicted places. France and some other States have, on the other hand, followed the practice of causing their naval commanders to give notice to every ship that may be directing its course to the blockaded place.

Before the era of the telegraph and other facile agencies for communicating information, there can be little doubt but that a general notification was often a most inadequate protection for

[1] *Vide infra*, p. 160. [2] *Vide* "The Times," 16 March, 1905.

[3] As to the authority competent to make notification, *vide* p. 116 *infra*. And as to blockades "by notoriety,' *vide* pp. 209, 226 *infra*.

neutral traders, even in those cases where the blockading Power permitted a period of grace before the blockade became operative against neutrals; the ship whose voyage would extend into weeks and even months would, as a rule, receive her first notice of a blockade from the guns of a belligerent cruiser as she sought entrance to the forbidden port; under such circumstances it was only in accord with the dictates of justice and common sense that the vessel innocently approaching the blockaded port should not be treated as a blockade breaker, but should be visited by a naval officer of the investing cruisers, and having been notified, by formal entry on her papers, of the existence of a blockade, should be permitted to withdraw from the interdicted area.

At the present day, however, the cases must indeed be few when knowledge of a blockade of which diplomatic notification has been given does not reach the owners and masters of merchant vessels almost contemporaneously with the original publication of the notifications, and it may therefore be doubted whether any such hardship can, save in very rare instances, be occasioned to neutrals by the absence of special notification.

The practice adopted by France, Russia, Sweden, Spain, and Italy, and approved by European jurists, is that the neutral vessel is entitled to sail to the blockaded port and there to receive notice of the existence of a blockade. Calvo thus states what he conceives to be the rights of neutrals and the duties of belligerents on this question :—

"Le navire pacifique venant donc verifier s'il y a blocus; le belligérant doit lui faire connaître le véritable état des choses. Cette notification toute particulière, personelle, doit être faite par un des officers des bâtiments de guerre chargés de maintenir l'investissement à chaque navire neutre qui se présente pour entrer dans le port bloqué. Nous ne pensons pas que ce soit aller trop loin que de regarder la notification spéciale comme une formalité essentielle du blocus si non obligatoire même pour le belligérant bloquant."[1]

Conformably to this doctrine, in the instructions given to her naval officers, in the decrees and treaties she has made, and in the judgments of her courts, France has invariably followed the rule of special notification. The clause in her treaties providing for this usually runs as follows :—

"Dans aucun cas, un bâtiment de commerce appartenant à des citoyens de l'un des deux pays qui sera expédié pour un port bloqué par l'autre Etat ne pourra être saisi, capturé ou condamné, si préalablement il ne lui a été fait une notification ou signification de l'existence ou de la continuation d'un blocus par les forces bloquantes ou par quelque bâtiment faisant parte de l'escadre ou de la division du blocus; et pour qu'on ne puisse

[1] Calvo, Vol. V, sec. 2846.

alléguer une ignorance du blocus, et que le navire qui aura reçu cette intimation soit dans le cas d'être capturé, s'il vient ensuite á se representer devant le port bloqué pendant le temps que durera le blocus, le commandant qui fera notification devra apposer son visa sur les papiers du navire visité, ou sera faite la signification de l'existence du blocus, et le capitaine du navire visité lui donnera un reçu de cette signification contenant les declarations exigées par le visa."[1]

As already indicated, the practice of Great Britain and the views of her jurists appear to regard a general notification as sufficient, and as raising the presumption that the neutral trader approaching the blockaded place had knowledge of the fact. Her practice has been generally uniform, as a brief historical retrospect will demonstrate.

By a treaty made by her with Holland in 1689,[2] it was provided that when ships had left their port of departure before the public notification of a blockade, they should be visited by a naval officer of the blockading squadron, and notification duly made and inscribed on the ship's papers. From this treaty we may draw the inference that Great Britain and Holland, so far back as the seventeenth century, were disposed to regard a public notification as presumably binding upon neutrals.

After the lapse of a century—viz. in 1799—the English Court of Admiralty for the first time laid down in tolerably clear language what should be the nature and quality of a notification of blockade sufficient to bind neutrals, viz. that it must be a "public notification from the Government of a belligerent country," and that after such notification the blockade would *prima facie* be presumed to continue until its public repeal.[3] This decision would appear to cast upon the neutral trader the onus of satisfying the Court that he had no knowledge of the blockade, and no adequate opportunity for acquiring knowledge. Calvo thus comments upon this judgment:—

"Le but de cette doctrine, qui est entrée dans la pratique anglaise, se réduit à établer une *presumptio juris et de jure* relativement à la connaissance du blocus. Et ce qui prouve qui cette presomption doit légalement exister pour la continuation du blocus c'est que ces Cours d'amirauté britanniques n'admettent pas que l'avertissement special fait aux capitaines neutres soit necessaire pour legitimer la capture des navires: à leurs yeux, il suffit que le bâtiment ait pour destination réelle ou présumée le port bloqué, elles n'exceptent de cette règle arbitraire que les navires expédiés non du pays dont ils portent le pavillon, mais d'une contrée assez éloignée pour qu'on puisse présumer que la nouvelle de l'interdiction du commerce n'y est pas parvenue.

"Nous croyons avoir réfuté victorieusement et sans réplique cette triste

[1] Cf. Pistoye et Duverdy, "Prises Maritimes," Vol. I, p. 370.
[2] *Vide infra*, p. 121. [3] The "Betsy," *ibid.*, p. 192.

doctrine, lorsque nous avons fait ressortir la distinction qui existe entre les trois modes de notification que l'usage a sanctionnés : le premier ayant un caractère purement local [i.e. notification to the authorities of the blockaded area], le second général [i.e. diplomatic], et le troisième special [i.e. to the masters of neutral ships by naval officers of blockading vessels]. Nous avons demontré que les deux premiers ne sauraient en aucun cas suppléer le dernier, et nous sommes d'avis que confondre deux choses d'une portée si manifestement differente, ce serait fermer les yeux sur les abus révoltants des prétentions anglaises et repousser de gaîté de cœur un des éléments juridiques essentiels du blocus."[1]

In the same year that the British Court of Admiralty made the pronouncement that has excited the profound indignation of Calvo and so many continental jurists, the British Government publicly notified the blockade of the United Provinces, and declared that after such notification vessels attempting to pass into or from the blockaded area would be captured as lawful prize; but in 1807, in deference to remonstrance from the United States on the occasion of the blockade by her of Guadeloupe and Martinique, she issued instructions that special notification should be given to neutral vessels by her naval officers.

The doctrine of the British Court of Admiralty that a public notification is sufficient to render neutral vessels amenable to capture and condemnation as prize if making for a blockaded place is founded upon a well-recognized and intelligible principle that notice to a foreign State carries with it notice to all the subjects of that State; but on the other hand, if there be reasonable ground for believing that the notification of the blockade could not in the natural course have reached the neutral trader, the Court would not condemn the vessel as prize if it were proceeding to some port near the blockaded area, but not within it, for the purpose of making inquiries, and this rule, as explained by Sir W. Scott in the "Betsy,"[2] is really founded upon conditions of communication and transit which are not applicable to the present day. It may therefore be taken that only in very rare instances at the present day would the Court display indulgence to a ship captured for sailing to a blockaded place, and certainly not on the ground that the State to whom the notification had been given had failed to notify its subjects.[3]

There are, however, quite distinct from the question of notification, circumstances under which a neutral vessel would be under no penalty for attempting to enter a blockaded port—that is to say, lack of provisions, sickness, or stress of weather; but in 1805, in

[1] Calvo, Vol. V, sec. 2847.
[2] *Vide infra*, p. 192.
[3] The "Spes" and "Irene," *vide infra*, p. 204.

the case of the "Fortuna,"[1] Sir W. Scott insisted that to constitute an excuse for seeking to enter a blockaded port there must be "an imperative and overruling necessity."

The policy of the United States with regard to notification is not very intelligible; their jurists generally adopt the views of British authors, but their treatises and declarations have more usually been in sympathy with the policy of France and continental States. Wheaton makes the following ambiguous observations:—[2]

"As a proclamation or general public notification is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of such a blockade be imputed to the party merely in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party in order to show that it has been violated. As on the one hand a declaration of blockade that is not supported by the fact cannot be deemed legally to exist, so on the other hand the fact duly notified to the party on the spot is of itself sufficient to affect him with a knowledge of it; for the public notifications between Governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration. Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party after sufficient time has elapsed to receive the declaration at the port whence the vessel sails. But when the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case the party has a right to make a fair inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless upon such inquiry he receives notice of the existence of the blockade."

The view of Wheaton appears to be that while a special notification is desirable and adequate, it is not absolutely essential, as a condition precedent to the capture and condemnation of a neutral ship if there was a public notification, and the State to which the ship belonged might have communicated such notification to its subjects, and she was, before making to the blockaded place, in a locality which such communication might have reached. This is in effect the British doctrine, though expressed with less force and clearness than by British jurists.

On the other hand, we find by her treaties and public declarations that the United States has given general countenance to the practice of special notification. In a treaty made in 1794 with

[1] *Vide infra*, p. 203.
[2] Wheaton's "Inter. Law," § 514.

Great Britain, she appears to recognize that ignorance of a blockade on the part of an owner or master will entitle the neutral ship to special notification, and thus negatives the doctrine of constructive knowledge based on a public notification.[1] Again, in 1861, on the blockade of the coast of the Southern States, Mr. Seward notified to foreign Governments that special notification would in all cases be given, but this rule was certainly not observed by her cruisers throughout the war—see, for example, "The Peterhoff," 5 Wall., 28, at p. 32. In 1898 President McKinley limited special notification to the case of those ships attempting to enter or leave a blockaded port "without notice or knowledge" of the blockade, and the Courts of the United States clearly recognize that special notice is not necessary in the case of actual knowledge.

The practice of the principal maritime nations with regard to notification may be summarized as follows: Great Britain, and perhaps Germany and Denmark,[2] regard a general notification as sufficient, treating it as constructive notice to all subjects of the State which has received such notification. The United States require actual knowledge on the part of the neutral, it being immaterial whether such knowledge were acquired by general or special notification. France and the other European nations regard special notification as an absolute condition precedent to capture and condemnation.[3]

The practice of the United States seems fair and reasonable to neutrals, and also to afford sufficient protection to belligerents; in the case of a ship sailing from a port in a country where notification had been received before the vessel sailed, a strong presumption would necessarily arise that the master or owner of the ship had knowledge, and the presumption would only be rebutted by very conclusive evidence to the contrary; but where absence of knowledge is clearly established, the Court would not allow the vessel to be condemned under the doctrine of constructive notice implied in the fact of diplomatic notification. There is a danger, however, inherent in the nature of Prize Courts, that their members will infer knowledge to be proved on evidence which would not be regarded as conclusive by persons free from those national prepossessions of which judges, however impartial, cannot be expected to divest themselves. From this the French practice protects merchants—possibly at too great cost to the belligerent.

Pacific blockade[4] applied as a form of coercion against inferior

[1] State Papers, Vol. I, p. 784.

[2] See Prussian Prize Regulations.

[3] As to Spain, see State Papers, Vol. LVI, p. 755. Letter from Commodore Blake to Commander Hervey, 28 Sept., 1865.

[4] On the subject of pacific blockade, see the "Annuaire de l'Institut de Droit International," 1887, pp. 275–300; the "Law Magazine and Review," August, 1897; and the "Revue de Droit International," 1897, p. 474, and *ibid.*, 1898, p. 606; and the authorities cited in the last-named article.

Powers, is not intended by the blockading Power to be regarded as involving a state of war between the State suffering and the State inflicting the blockade. Blockade in its only legitimate sense involves the existence of actual hostilities, and is a right of belligerents only. From an international standpoint, a so-called pacific blockade, though unknown to the great masters of international law, has of late years been tolerated because it affords the effective means of maintaining general peace when menaced by the provocative policy of some inferior Power. Jurists have for the most part protested that international recognition should not be accorded to a blockade instituted as a means of pacific coercion. This protestation would be amply justified were the nation imposing the "blockade" to seek to interdict the egress or ingress of foreign commerce from or to the places blockaded, for it would be intolerable that neutral Powers should be called upon to submit to restraints upon their commerce for any cause less than the exigencies of a formal belligerent; and therefore there appears to be now a general consensus of opinion that pacific blockade should not extend its application further than the interdiction of ingress and egress to the blockaded country of vessels belonging thereto, and that in no case should neutral commerce be molested.

The first recorded example of a pacific blockade was that afforded by the blockade of the Greek littoral, then a part of the Ottoman Empire, by the united squadrons of England, France, and Russia. This action was one of the consequences of a treaty made the same year between these three Powers, by which they undertook to intervene between the Greek nation and the Government of Turkey. This blockade was declared to be obligatory upon the vessels of neutral Powers, and yet during the whole period of the blockade, and even after the battle of Navarino, the allied Powers were continually representing to Turkey that the ties of friendship between them and the Divan were not affected. The true conception of the situation was, however, correctly described by the Turkish Secretary of State, when he observed in answer to these protestations :—

"Ce que vous assurez ne pas porter atteinte à l'amitié est, suivant nous, une infraction à cette même amitié. . . . Les moyens dont vous parlez offrent une incompatibilité si remarquable, qu'on peut dire que le feu et le coton, ou l'eau et le feu ne sont pas moins opposés."[1]

A distinguished French jurist thus expresses his concurrence in those words of the Turkish Effendi :—

"Je n'avais pas à examiner la question dans ses rapports entre les nations

[1] Report of Dragomans, 9 Sept., 1827. State Papers, Vol. XVII, p. 257.

attaquantes et attaquées, je n'ose dire belligerantes, puisqu'elles pretendent être dans un état de paix parfait. Considérée sous ce point de vue, je dois déclarer que je partage plutôt l'avis du reis effendi que celui des diplomates chrétiens, et que je ne puis concilier l'idée de paix et d'amitié avec celle de blocus."[1]

It seems impossible to maintain that the imposition of a blockade by one State upon another is not a form of waging war, and therefore inconsistent with the existence of pacific relations between the two States; it is an assertion of domination over the ports or littoral blockaded, and that assertion is vindicated by force against the vessels of the blockaded State which attempt to defy it. In truth, a pacific blockade is an easy and inexpensive method of waging war upon a feeble State; it inflicts, indeed, much of the inconvenience and injury of war upon the blockaded at a minimum of cost or disadvantage to the blockading State. Its justification, if any, is to be found in this: that it is a means of securing a given object without the effusion of blood, or even, as in the struggle of 1827 between Turkey and Greece, of bringing to a swift conclusion a cruel and merciless war of extermination—though it may be doubted whether in most if not all instances the objects sought by pacific blockade might not as effectually and, in ultimate result, with as little violation to the dictates of humanity, be compassed by actual war.[2]

In 1831 the Government of Louis Philippe, on account of certain minor outrages committed upon French subjects, instituted a strict blockade of the Tagus and captured a large number of Portuguese ships of war and merchantmen. The blockade resulted in the concession of all the French demands for reparation.

To show how this proceeding was regarded in England, we have recourse to the pages of Hansard. It was complicated with a claim which Louis Philippe was then making to demolish certain Belgian fortresses at his own hand. His public assertion that the tricolour floated under the walls of Lisbon, and that the Portuguese fleet was at his mercy, coupled with the observation that the Belgian fortresses "erected to threaten France" would be demolished, excited (even through the smoke of the Reform contest) a lively emotion in Great Britain. How little "pacific" character attached to the French proceedings in the Tagus is clear from Lord Palmerston's statement[3] that the forts had actually resisted, though slightly. On the day following that

[1] Hautefeuille, Vol. III, 179 (Tit. ix. c. 4).
[2] De Clercq, Vol. IV, p. 115.
[3] Hans. (3rd Ser.), V. p. 275. Cf. the Siamese proceedings of France in 1893, *infra*, p. 180.

statement, Lord Aberdeen warmly attacked Earl Grey for his acquiescence in seeing "our most ancient ally thus at the mercy of the navy of France," and sarcastically added that "it might perhaps be matter of congratulation to the noble Earl and his friends that a French fleet should ride in triumph on the Tagus." The Duke of Wellington took up the attack, and remarked that "when he read that passage of the speech of the King of France, in which he triumphantly boasted that the Portuguese ships of war were then in his power, and that the tricoloured flag floated under the walls of Lisbon, he felt his cheek tinge with shame, as an English subject, that our most ancient and intimate ally should be so treated with our permission." And Earl Grey made the vitally significant admission that blockade, however "pacific," is war, by referring to the "*hostile* relations between France and Portugal," and to the French as having "triumphantly *taken possession* of the Tagus."

On July 27,[1] Sir R. Peel quoted with disfavour the French King's address: "To obtain reparation, demanded in vain, our ships of war have appeared before the Tagus. I have just received the news that they have forced the entrance. The satisfaction, hitherto refused, has been offered to us [and, he might have added, we are taking advantage of the opportunity to do a stroke of business in the way of a commercial convention]. The Portuguese men-of-war are in our power, and the tricoloured flag flies under the walls of Lisbon." "By that passage," said Peel, "the French King announced to his subjects that the fleet of Portugal, the most ancient and the most faithful of the allies of England, had fallen into the power of its enemies, and that the tricoloured flag floated victorious in her capital. That passage announced *that there was war* between France and Portugal. It announced that the victorious fleet of France had forced the defences of the Tagus, and that the capital of Portugal was at the mercy of the conqueror."

On September 5,[2] Lord Aberdeen details the circumstances at greater length than they are elsewhere to be found set out, and he is at pains to argue that there was no such war as would suffice to legalize the taking of the Portuguese ships as legitimate prizes. He does not even contemplate the possibility of their being captured without war; and, indeed, it has been reserved for our own time to regard with equanimity any such illogical notion. Earl Grey was content to treat the operations as a war.[3] "The noble Earl (Aberdeen) admitted that ships of war would be

[1] Hans. (3rd Ser.), V, p. 398.
[2] *Ibid.*, VI, p. 1103.
[3] *Ibid.*, p. 1110.

legitimate prize if *the war* had been legitimate. He (Lord Grey) was not aware that we had any right to investigate the original cause of *war*. Whether *the war* was just or unjust, the question of prize must be regulated by the usual law of nations." So the Duke of Wellington—"Even when the French Admiral was before Lisbon, it was not too late. *War* did not commence until the 8th of July. . . ." The Duke added the following observations, which are most important from the point of view of those to whom this case of the Tagus is cited as an authority for the establishment of blockades in time of peace:—

"He had never heard of anything which had filled his mind with more indignation than the conduct of the French Admiral. On the 8th of July . . . he informed the Portuguese Government that, if they did not adopt the articles, war would exist *de facto*. On the 11th of July, the French Admiral wrote word that the French, always generous, added nothing to those terms, except compensation to those who had suffered by hostilities—when, in fact, the only persons who had suffered were two sailors who had been hurt by the explosion of a ship. On the 12th the terms were agreed to, and on that day the demand was made for the surrender of the Portuguese fleet. . . . The Portuguese shipping were not the first to fire on the French fleet, but the French fleet fired on the shipping. The Portuguese then fired on the French fleet, after having been fired on, and then struck their colours and hoisted the French."

Certainly a curious commentary on the pacific character of the proceedings! The danger of allowing a semblance of legality to any such half-way house between peace and war can hardly be exaggerated.

In the above case the King's Advocate appears to have given an opinion that the captures were legal; but it is uncertain whether this was on the ground that he considered the French measures to amount to war. According to Lord Palmerston,[1] the ships were kept by France. "All the Portuguese ships of war struck to the French, in consequence of the engagement which took place when the French fleet entered the Tagus. That portion of the fleet which took part in the action was considered prize of war and retained as such. One line of battleship, which was dismasted and took no part in the action, was given up."

Prior to the appearance of the French fleet their consul quitted Lisbon.[2]

The "Annual Register" says of this year (1831), that Paris continued to be the scene of ever-renewed disturbances under the vacillating ministry of M. Lafitte. The popular party insisted on democratic change, and their foreign policy went

[1] *Ibid.*, p. 99.
[2] "An. Reg.," 1831, p. 444.

further, demanding that the country should embroil itself with every foreign country where there existed disaffection. It was an insult to "new France" to stand by the Bourbon treaties. And Portugal was ruled by Miguel. A critical election was in progress at the very time when the French entered the Tagus.

At the close of 1832, in order to overcome the resistance of the Low Countries to their separation from Belgium, as provided by the treaty of November, 1831, Great Britain and France, without breaking off diplomatic relations with the Hague, established *de facto* a blockade of the Scheldt, so that finally Holland acquiesced in the suggested international arrangements, and the independence and neutrality of Belgium were assured.[1] But the capture of Antwerp powerfully contributed to this result; nor can it be said that when French and Dutch were fighting there perfect peace prevailed; nor so long as France retained Dutch troops as prisoners of war.

In 1836, France, while protesting that she maintained diplomatic relations, declared a blockade of the ports of Mexico; the Mexican Government treated this declaration and the consequent blockade as a *casus belli*, and formally declared war.

From March, 1838, to October, 1840, France maintained a pacific blockade of the ports of the Argentine Republic.[2] The intervention of France was entirely in relation to the internal affairs of the Argentine, and at the present time such intervention would possibly be regarded by the United States as a distinct violation of the Monroe doctrine; the pressure thus put upon the republic was only partially successful, and France was constrained to recognize the dictator Rosas, whom she had denounced as having outraged the laws of humanity.[3]

In 1845, at the instigation of Brazil, France again interfered in the internal affairs of the Argentine and Uruguay, and in conjunction with England made certain demands upon the Government of the dictator Rosas, on the refusal of which the two Powers instituted a blockade nominally of a pacific character, but in 1849 Great Britain concluded a treaty renewing her friendly relations

[1] De Clercq, Vol. IV, p. 146. Austria, Prussia, and Russia refused to join in the measure; it comprised an embargo on Dutch ships, and the Dutch imposed a like embargo on the ships of Great Britain and France. No formal declaration of blockade appears to have been made; the only document in the British State Papers is one "prohibiting [British] trade with the Netherlands and laying an embargo upon Netherlands vessels in British ports," which incidentally enjoins H.M.'s ships to bring in all merchant vessels flying the Dutch flag (State Papers, Vol. XIX, p. 1420). There seems to be no record of any prizes being brought in. If any were, the case was probably treated as one of embargo, and the ship and cargo simply sequestrated *pro tem.*

[2] Against this blockade the Hanse towns formally protested ("Ann. de l'Inst. de Droit Int.," 1887, p. 292).

[3] De Clercq, Vol. IV, p. 591.

with the Argentine, without having secured any one of the objects for which she appeared to have intervened.[1]

In August, 1850, France followed the example of England, and by a treaty of friendship brought to an end her fruitless but costly intervention in the internal affairs of the South American Republics.[2]

In 1850, England had recourse to a pacific blockade of the Greek littoral in order to secure reparation for an alleged indignity offered to a boat's crew of H.M.'s ship "Fantome," and for certain grievances suffered by British subjects resident in Greece. The blockade was at first confined to the prevention of egress against Greek Government vessels leaving the Piræus; —as the Greek Government remained obdurate the blockade was extended to other parts of Greece; but care was taken that the blockade should be applicable only to Greek vessels which were not laden with cargoes the property of foreigners. Ultimately, after Greek commerce had sustained considerable loss, the Government of Athens acceded in substance to the demands of the British Government.[3]

In 1858, Peru instituted a blockade of Ecuador, intended to be pacific,[4] and in 1861, England imposed a pacific blockade upon Rio de Janeiro in order to obtain indemnity for the pillage of a British ship wrecked upon the coast of the Brazilian province of Rio Grande do Sul. Five ships were captured, and diplomatic relations between the two countries were severed for years; but the proceeding was not strictly a blockade, being limited to the seizure of these ships by way of reprisals.

In 1861, the Government of Piedmont established a pacific blockade of Gaeta during the rebellion against the King of the Two Sicilies, with the ostensible object of reducing the town, then besieged by insurrectionary forces. It should be noted that the Government of Piedmont insisted upon the continuance of its amicable relations with the Two Sicilies during the progress of the blockade.

In 1885, France instituted the blockade of Formosa, on the

[1] Palmerston, writing to the British Ambassador in Paris (see his life by Dalling, III, p. 327) says: "The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of La Plata has been from first to last illegal. Peel and Aberdeen have always declared that we are not at war with Rosas; but blockade is a belligerent right, and unless you are at war with a State, you have no right to prevent ships of other States from communicating with the ports of that State. . . . I think it important, therefore, in order to legalize retrospectively the operations of the blockade, to close the matter by a formal convention of peace between the two Powers and Rosas." (Cited, Hall, "Int. Law," ed. V, p. 371.) See State Papers, Vol. XXXVII, p. 7. Britain and France agreed to salute the Argentine flag, and to restore captured vessels of war; captured merchantmen were to be reciprocally restored.

[2] Samwer, "Recueil," Vol. II, p. 51. [3] State Papers, Vol. XXXIX, p. 216.

[4] *Infra*, p. 161. State Papers, Vol. XLIX, p. 1320.

ground of the violation of the treaty of Tien-Tsin, and the failure to pay indemnities demanded on account of certain outrages. The French Ambassador announced the blockade to the English Government in these terms:—

"Je suis chargé par mon gouvernement de porter à la connaisance de votre Seigneurie que les ports et rades du nord et de la côte ouest de l'Ile de Formose seront mis en état de blocus effectif à parter du 23 Octobre prochain. Un délai de trois jours sera donné aux navires amis pour achever leurs chargements et quitter les lieux bloqués."[1]

It will be observed that this communication differs in no material sense from a notification of blockade by a belligerent, and in that sense it was accepted by the English Government; but the French Ambassador hastened to reply that there was no war between France and China, and that the interdiction of commerce with the coast of China and Formosa was of the nature of a pacific blockade. Lord Granville thereupon promptly repudiated the right of a nation at peace to establish a blockade against any vessels other than those belonging to the country whose ports were blockaded, and insisted that a state of actual warfare did at that time exist between France and China. Considerable correspondence passed between the French and English ministers, and the attitude of England with respect to pacific blockades was very clearly stated by Lord Granville in a despatch to the French Ambassador of 26 November, 1884:—

"Her Majesty's Government consider that a state of war exists between France and China *de facto* and *de jure*. They have instructed the Governor of Hong-Kong to enforce the Foreign Enlistment Act (which is only operative during the existence of hostilities between foreign States with which Her Majesty is at peace), and the French Admiral has given his assurance that he will scrupulously observe its provisions. Bombardments and other hostilities have taken place, and the French Government have proclaimed to neutral Powers the effective blockade of the ports of Formosa, and have warned H.M.'s Government that British ships attempting to enter those ports to which they have the right of access by treaty will be captured.

"H.M.'s Government cannot admit any such novel doctrine as that British ships are liable to capture for entering certain treaty ports in China in time of peace. But they maintain that a state of war exists, and therefore they do not deny the right of the French Government to establish an effective blockade of the ports in question according to the laws of war and to capture neutral vessels attempting to force it."

In a former despatch of 11 November, Lord Granville observed:—

"Moreover, the contention of the French Government that a 'pacific blockade' confers on the blockading Power the right to capture and con-

[1] State Papers, Vol. LXXVI, p. 423.

demn the ships of third nations for breach of such a blockade, is opposed to the opinions of the most eminent statesmen and jurists of France and to the decisions of its tribunals, and it is in conflict with well-established principles of international law."

This controversy between England and France was terminated by the raising of the blockade and the conclusion of a treaty of peace between the latter country and China.[1]

In 1886, the Greek nation, excited by the revolution at Philippopolis, menaced Turkey with war. The Great Powers, alarmed at the prospect of a war the limits of which it was impossible to foretell, issued the following declaration :—

"En vue de l'absence de tout motif legitime de guerre de la part de la Grèce contre la Turquie, et du prejudice qu'une pareille guerre porteraient aux interêts pacifiques, et notamment au commerce d'autres, aucune attaque navale de la Grèce contre la sublime Porte ne saurait être admise."

This declaration proving ineffective, the Powers determined upon a pacific blockade, which was rigidly enforced in its operations to vessels under the Greek flag (sous pavillon Grec).

In 1897, in consequence of an armed insurrection in Crete against Turkish rule, and in order to prevent Greece from rendering aid to the insurgents, the allied Powers—England, France, Germany, Russia, Austria and Italy—instituted a pacific blockade of the Island of Crete against vessels under the Greek flag.

In 1902, England, acting in union with Germany, instituted a blockade of the coast of Venezuela in consequence of the failure of the Venezuelan Government to afford reparation for various improper interferences with British and German property. The blockade extended from 20 December until 15 February following.

In this blockade the British and German Governments reverted to the old practice, which had been vehemently repudiated by Lord Granville, of rendering the blockade applicable to vessels other than those flying the flag of the blockaded country, but extended to their shipping the protection of "special" notification. The instructions given by the Admiralty to the officer in command of the blockading squadron were as follows :—

"ADMIRALTY, 11 *December*, 1902.

"You are to issue the following [omitting unimportant parts] notification :—

"You are hereby notified that a blockade of the ports of La Guayra, Carenero, Guanta, Cumana, Carupanio is declared, and will be effectively maintained from and after —— day of December subject to the following

[1] *Ibid.*, Vol. LXXVI, p. 428. *Ibid.*, p. 1020.

days of grace: For vessels sailing before the date of their notification from West Indian ports and from ports on the east coast of the continent of America, 10 days for steamers and 20 days for sailing vessels; from all other ports, 20 days for steamers and 40 days for sailing vessels; for vessels lying in ports now declared to be blockaded, 15 days. Vessels which attempt to violate the blockade will render themselves liable to all measures authorized by the law of nations and the respective treaties between His Majesty and the different neutral Powers.

* * * * * *

"(1) Every merchant vessel sailing under other than the Venezuelan flag which may be found by one of the blockading ships in the immediate neighbourhood of a blockaded port, is to receive a special notification in accordance with the following procedure:

"(2) An officer of the blockading ship is to be sent on board the merchant vessel. He is to notify to the master of the merchant vessel the existence and extent of the blockade, and is to inform him that he cannot be permitted to communicate with the blockaded port, and that any attempt to do so in defiance of such warning will render his vessel liable to seizure and detention for trial in a Prize Court, with probable ultimate confiscation of ship and cargo.

"(3) The boarding officer will then enter in the log-book of the merchant vessel and on the document which fixes her nationality the name of H.M.'s ship by whom the notification in his person has been made, together with a statement of the terms of the notification and the date and place at which the visit was made, and to these entries he will affix his signature.

"(4) Any such vessel which may appear to have an intention of breaking the blockade is to be ordered to quit the neighbourhood under pain of seizure.

"(5) Every merchant vessel sailing under other than the Venezuelan flag which in defiance of the above notification attempts to communicate with any of the blockaded ports, is to be seized and thereupon conveyed to Port of Spain, Trinidad, where she is to be handed over to the Prize Court.

"(6) Merchant vessels which, on being boarded—

(*a*) Produce obviously false papers;

(*b*) Refuse or fail to produce the necessary documents to prove their nationality, identity, and destination—

are to be considered as attempting to break the blockade, and are to be ordered to quit the neighbourhood under pain of seizure and ultimate confiscation.

"(7) Merchant vessels sailing under the Venezuelan flag, or merchant vessels sailing under other than the Venezuelan flag which may be proved to be in the service of the Venezuelan Government, are to be seized and treated as prize of war.

"(8) The exceptions to the above instructions are as follows:—

(1) Ships which are *bona fide* in distress are to be permitted, as need shall arise, to enter or leave a blockaded port.

(2) The blockade does not affect foreigners—that is to say, persons of other than Venezuelan nationality who wish to leave

the country. Ships under other than the Venezuelan flag which have such persons on board and possess certificates from their consuls, together with papers in proper form, will, after giving previous notice to the blockading ships, be allowed to pass. But such ships may have no cargo on board beyond the baggage of *bona fide* travellers.

(3) Every consideration is to be given, compatible with the exigencies of the blockade, to British and German nationals and the subjects of neutral States."[1]

When one considers the terms of this circular, it is not easy to comprehend the use of the word pacific in relation to the blockade of the ports of Venezuela: and it is impossible without absurdity so to describe it, when it is remembered that in the course of the operations Venezuelan batteries fired on German and British ships, that one or two smart actions were fought, and that several Venezuelan men-of-war were sunk and captured. How could navies carrying out such operations, claim all the privileges of peaceful intercourse with "neutrals"? A country is not at liberty to escape the inconveniences of war merely by asserting the peaceful character of its violence. It is also remarkable that the English Government, in defiance of the attitude strenuously maintained by Lord Granville in 1885, extended the operation of the blockade to vessels other than those flying the flag of Venezuela; no remonstrances were apparently made by foreign Governments, but the blockade was brief, having been raised two months after its declaration.

Whatever may be the value of the objections of theorists to the admission of the doctrine of a pacific blockade into the principles of international law—and the objections are indeed weighty and numerous—the arguments in favour of this species of blockade, derived alike from considerations of humanity and convenience, present much attraction for politicians. It is, no doubt, as M. Guizot observed when speaking upon the pacific blockade of Buenos Ayres in 1841,[2] an incomplete form of warfare; but (while devoid of risk to the blockader, and raising no delicate constitutional problems or spectres of war) it possesses many of the characteristics and incidents of war. It involves the employment of force against those resisting the interdiction, it is a violation of the territorial integrity of the State against which it is employed, and it is an act of hostility on the part of the blockader which is only prevented from resulting in obvious war on account of the impotence of the blockaded. Moreover, it is in violation of the well-established

[1] Accounts and Papers, Vol. LXXXVII, (1903): Venezuela. See also "London Gazette," 19 December, 1902.

[2] *Vide* "Moniteur," 9 February, 1841.

principle that the exigencies of a belligerent are the sole justification for a third Power interfering with the commercial relations of friendly States. It may be that this last objection is the strongest, and undoubtedly the better course to pursue would be to confine the blockade to vessels carrying the flag of the blockaded State. In some measure the coercive value of the blockade might be abated, but there can be little doubt that in most cases the interference with the native mercantile marine would operate as a sufficiently effective form of coercion. If one consider the comparatively few instances of pacific blockade, none going further back than the year 1827, it is necessary to admit that while occasionally a pacific blockade was but the prelude to war, it has once or twice been an effective instrument for maintaining peace;[1] but when one regards the fact that the essential characteristic of a pacific blockade is that from a diplomatic standpoint there is no rupture of peaceful relations between the Powers concerned, it seems highly desirable that upon its cessation there should, as far as possible, be *restitutio in integrum* to the blockaded State, and that any vessels seized should be restored. The "Institut de Droit International" appears to have formed a just conception of the conditions which should properly pertain to blockades of this character if they are to be admitted as legitimate, and in the year 1887 it made the following pronouncement:—[2]

"L'établissement d'un blocus en dehors de l'état de guerre ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes:—

"(1) Les navires de pavillon étranger peuvent entrer librement malgré le blocus.

"(2) Le blocus pacifique doit être déclaré et notifié officiellement et maintenu par une force suffisante.

"(3) Les navires de la puissance bloquée qui ne respectent pas un pareil blocus peuvent être séquestrés. Le blocus ayant cessé ils doivent être restitués avec leurs cargaisons à leurs propriétaires mais sans dedommagement à aucun titre."

The establishment of a blockade can only be the act of a sovereign State, by its central authority or by some subordinate authority to whom the execution of that act may expressly or by implication be delegated. Such delegated authority by implication would exist in the case of the commander of naval forces, being far removed from the seat of government, but neutral Powers might, it is opined, justly refuse to recognize a blockade established

[1] Though the high authority of De Martens is against this view—"Il n'a jamais empêché la guerre," he declared at Heidelberg in 1887 ("Annuaire de l'Institut de Droit International," 1887, p. 296).

[2] "Annuaire de l'Institut," 1887–8, p. 300.

by a naval officer who was under no such disability. The British Court of Admiralty in the "Rolla"[1] decided that no special mandate from the central government was necessary to justify a commander in instituting a blockade, but in deciding whether or no he had such authority, the Court must be guided by the character of his office and the general nature of the duties confided to him, or the special circumstances under which he acted.

Nor can the rank or status of the officer establishing the blockade be regarded as a final test. An inferior officer, under stress of an emergency and without means of ready recourse to the central authority or his superiors, is entitled to exercise the full powers of the State, and he is clearly only responsible for the excess of his authority to the Government of the State he serves, from whom alone aggrieved third parties are entitled to seek redress.

At the same time, it must be borne in mind that if any naval officer acts outside the limits of his authority he does so at his peril, and the Court will not uphold his action; thus, if a blockade be established over a certain area, a naval commander has no right on his own motion to extend that area; for, as Sir W. Scott said: "A declaration of blockade is a high act of sovereignty, and a commander of a king's ship is not to extend it."[2] The same judge in a subsequent case laid down that a blockade, being the exercise by a belligerent of a severe right against neutrals, must not be aggravated or extended by construction.[3]

A blockade ceases by—(1) the intentional act of the belligerent imposing the blockade; (2) allowing the blockade to become ineffective; (3) *force majeure;* (4) some improper conduct, such as partiality to particular nations, or acts misleading to neutrals, in the course of carrying out the blockade.

In the first case, the duty of a belligerent State is to give a notification of the discontinuance, equally formal and public with that which she issued of the establishment, of the blockade, for it is only reasonable that the belligerent should take care that the inconvenience and loss accruing to neutrals through the cessation of their commerce with ports to which they had been accustomed to trade should not last for any longer period than the necessities of war might require; in truth, there is no difference in the opinion of jurists, nor in the practice of nations, that public notification thereof should succeed the intentional discontinuance of blockade.

A question of a very different character arises when the belligerent so conducts himself that the blockade no longer *de facto*

[1] Rob., Vol. VI, p. 364; *vide infra*, p. 210; the "Henrick and Maria," *ibid.*, Vol. I, p. 148; the "Adula," United States Reports, Vol. 176, p. 361.

[2] The "Henrick and Maria," *ut supra; vide infra*, p. 189.

[3] The "Juffrow Maria," *vide infra*, p. 197; the "Haabet," *vide infra*, p. 264.

exists. This state of things may arise from various causes: it may be that some vessels of the blockading force may, in order to perform some other duty, temporarily detach themselves therefrom, and thus render the blockade no longer in fact existent; or, on the other hand, the cause may be of a character over which the belligerent has little or no control: sickness, tempest, lack of provisions may necessitate if not the withdrawal of the whole blockading force, at least such portion thereof as to render the remainder incapable of sufficiently effective action against vessels which may seek to enter or leave the interdicted ports. In the former case it would not be unreasonable to apply the severe rule of the stricter school of jurists, which declares that so soon as a blockade ceases *de facto* it also ceases *de jure*. Hautefeuille thus states this extreme view:—

"Mais, par cela même que le blocus est une conquête et une occupation permanente, un fait matériel en un mot, il cesse dès que ce fait n'existe plus, dès que les bâtiments de guerre chargés de l'occupation s'éloignent par quelque cause que ce soit, volontaire ou involontaire, les vents, une tempête, les maladies, le manque de vivres, les forces de la nation attaquée a pris fin, la conquête n'existe plus, il n'y a plus de blocus, la mer territoriale est retournée a son premier souverain, qui seul peut désormais y exercer sa juridiction."

The English doctrine appears to be as follows: If the cause—other than duress by the enemy or naval exigencies elsewhere—be practically unavoidable which results in a cessation of a blockade, and if that cessation be only of a very temporary character, the blockade does not *de jure* cease, so as to necessitate a new blockade, or to render vessels which enter or leave the interdicted area non-amenable, if captured before their voyage be complete, to the penalties for violation of blockade; but, on the other hand, if the naval commander intentionally and of his own free will, under whatever exigencies of the service of his own State, for however short a period (except perhaps for chasing), suffers the blockade to be inoperative, then the blockade *de jure* ceases. Such, indeed, was the view of Sir W. Scott, as expressed in the "Juffrow Maria Schrœder."[1]

The third case, that of *force majeure*, explains itself. The fourth requires a word or two. A blockade which does not correspond with that laid down in the official notification is bad *ab initio*, and bad in all its parts, even those which are effective.[2] And if during the course of a blockade it is partially abandoned, it cannot be doubted that in the absence of immediate notifi-

[1] 3 Rob., 155. *Vide infra*, p. 197.

[2] Unless, perhaps, it may be possible to support them on the ground of notoriety. See the "Franciska," *infra*.

cation to neutrals, they will be entitled to consider the whole blockade as at an end. Similarly, any steps tending to confuse neutrals as to the true aspect of affairs must on principle invalidate the blockade. Its relaxation in favour of a particular nation may be regarded as an instance of this. The admitted fatal effect of such an indulgence may also be attributed to an assumed duty of belligerents to be impartial towards the neutrals who are so greatly affected by their warlike measures, and who are obliged to preserve impartiality towards themselves.[1] But no such rule of impartiality towards neutrals appears to be recognized in other matters.

We now turn to the examination of particular cases.

In the year 1223,[2] we find an instance of an interdiction by King Henry III being placed upon his subjects from conveying provisions, or any other commodities, to the territories of Llewellyn, Prince of Wales. This cannot be regarded as of the nature of a blockade, but rather as the interdiction of commercial intercourse between the subjects of Henry III and those of the Prince of Wales; and of the same character appears to be a further proclamation of Henry III in 1245[3] against commerce with the Welsh. On the other hand, in the reign of Edward II, during the war between England and Scotland, we find an instance of French vessels trafficking with the Scots, apparently not in contraband, being seized by the King's ships, and only restored to their owners as a matter of grace and courtesy to the French King.[4] The documents here referred to are as follows:—

"De gravando Principem Walliæ. Rex vice comiti Devoniæ salutem. Præcipimus tibi firmiter injugentes, quod per omnes portus maris ballivæ tuæ districtè prohiberi facias quod nullus, sicut se et sua diligit, victualia aliqua, sive res alias venales ducat in terram Leulini sive in terram Walensium sibi adhœrentium. Sed omnes cum victualibus et rebus aliis venalibus, secure veniant in Suwalliam ad exercitum nostrum in terram, videlicet, Nostram de Kaermerdin, et de Kaerdigan et in terram Comitis W. Marescalli.—Teste apud Wigorn., 11 Die Julii, A.D. 1223."

"De Commercio cum Wallensibus interdicto. Mandatum est Johanni de Grey Justiciario Cestriæ, quod, per totam ballivam suam, cum quanta fieri poterit festinatione, in singulis Burgis et bonis Villis et Hundredis publice clamari et firmiter observari faciat, quod nullus de ballivâ suâ, sicut corpus suum diligit, aliquod genus victualium, ferrum, vel acerum, vel pannum vel quamcunque aliam mercem vendat, mittat vel ducat vel pro posse suo duci vendi vel mitti permittat ad opus Walensium inimicorum regis.

"Et si aliquem intercipere possit qui victualia vel aliquas merces quascunque eis vendere, vel mittere attemptaverit contra hanc prohibi-

[1] The "Franciska," Northcote *v.* Douglas. 10 Moo. P.C.C. 37. Spinks, 135.
[2] Rymer's "Fœdera," Vol. I, p. 260.
[3] *Ibid.*, p. 440. [4] *Ibid.*, Vol. III, p. 880.

tionem regis; omnia illa, merces et victualia in manum regis capiat et ad opus regis salvo custodiat tanquam ea quæ regi incurruntur.

"Corpus autem ipsius vendentis, vel mittentis incontinenti capiat et in prisona regis salvo custodiat donec id regi significaverit et aliud a rege habuerit mandatum.—Teste Rege apud Wigorn., x November, 1245."

"Ad regem Franciæ super navibus captis durante Treuga cum Scotis. Magnifico principi domino Philippo dei gratiâ Franciæ et Navarræ Regi illustri fratri suo carissimo Edwardus &c. salutem et prosperos ad vota successus. Litteras vestras, pro magistro Johanne Donnys et Clemente Odonis de Diepa mercatoribus vestris, nobis directas recepimus; continentes quod iidem, Johannes et Clemens, unam navem oneratam pluribus merchandisis ad regnum Scotorum vendendis; et pro aliis mercaturis emendis in eodem, Treugis inter nos ex unâ parte et Scotis ex alterâ durantibus destinâssent.

"Quæ quidem navis in eodem regno evacuata et postmodum ibidem aliis mercaturis onerata, dum de partibus illis ad regnum nostrum reduceretur, quendam portum nostrum de Ravenseroade infra dictum regnum nostrum per tempestatis infortunium ut dicitur applicuit;

"Quæ quidem navis, mercaturae, nec non et homines in eâdem navi existentes eâ de causâ solummodo quod de prædicto regno Scotiæ venebant arestati fuerant et adhuc sub aresto detinentur. Super quo nos rogâstis quatinus mercatores prædictos, cum navi et mercaturis antedictis dearestari facere et ipsos indempnes observare vellemus.

"Super quo sciant vestra excellentia reverenda, quod in dictis treugis interdicta est communio subditorum nostrorum et illorum de Scotiâ durantibus dictis treugis.

"Set licet præfatos, Johannem et Clementem tanquam dictis inimicis nostris adhœrentes punire possemus, ut deceret, ad requisitionem tamen vestram, dictos Johannem et Clementem una cum navi bonis et merchandisis suis istà vice, dearestari et eis bona sua mandavimus liberari.

"Vestram serenitatem attentius deprecantes quatenus subditis vestris, ne cum dictis inimicis nostris communicent velitis si placet facere inhiberi.

"Dat: apud Walyngfordiam, 4 Maii, 1321."

In 1630, the States General of the United Provinces issued an ordinance relating to the blockade of the ports of Flanders.[1] The first article of the ordinance published in the language of the Low Countries provides for the confiscation of neutral vessels with their cargoes which might be found coming out of, entering into, or sailing near—so that an intention to enter might be inferred—the blockaded ports; the second article recites the fact that the United Provinces maintain a continual blockade of those ports in order to prevent carriage of goods to and commerce with the enemy; and further, the ordinance affirms knowledge on the part of other nations that the ports were blockaded, and asserts that such blockade was in accordance with ancient custom: "havenen met Oorlog schepen continuelyk beset honden, om de commercie met den vegand aldaar te beletten, 't welk van onds in

[1] Aitzema (Lieuwe Van), "Historie," Vol. X, p. 177. See also "Consil. Holl.," Vol. III, Amsterd., pp. 54–7.

gebruyk is geweest, op't exempel van alle die oot gelyk regt in godanige gevallen gebruyken."

Robinson gives the French text in full :—[1]

"Les Etats Generaux des provinces unies aiant reveu et pesé les positions des cas ci a côté ont après une meure déliberation préalable et sur l'avis des respectifs Colleges d l'amirauté trouvé bon et entendu à l'égard du prémier point que les vaisseaux neutres qu'on trouvera, qu'ils sortent des ports ennemis de Flandres, ou qu'ils en sont si près qu'il est indubitable qu'ils y veulent entrer, que ces vaisseaux avec leurs marchandises doivent etre confisquez pas sentence des susdits respectifs colleges et cela à cause que Leurs Hautes Puissances tiennent continuellement les dits ports bloquez pas leurs vaisseaux de guerre à la charge excessive de l'état, afin d'empecher le transport et le commerce avec l'ennemi, et parce que ces ports et ces places sont reputez étre assiegez, ce qui a été de tout tems un ancien usage, selon l'exemple de tous les Rois, princes puissances, et autres republiques qui se sont servis du même droit dans de semblables occasions.

"2. A l'égard du second point, Leurs Hautes Puissances déclarent, que les vaisseaux et marchandises neutres seront aussi confisquez, quand il constera par les lettres de cargaison, connoissemens, ou autres documens, qu'ils ont été chargez dans les ports de Flandres, ou qu'ils sont destinez d'y aller, quand même on ne les auroit rencontrez que bien loin encore de là, de sorte qu'ils pourroient encore changer de route et d'intention. Ceci etant fondé sur ce qu'ils ont deja tenté quelque chose d'illicite, et mis en œuvre, quoi qu'ils ne l'ayent pas achevé, ni porté au dernier point de perfection, à moins que les maîtres et les propriétaires de tels vaisseaux ne fissent voir dûëment qu'ils avoient désisté de leur propre mouvement de leur entreprise et voyage destiné, et cela avant qu'aucun vaisseau de l'état les eût vû ou poursuivi et que ceux-ci trouvassent la chose sans fraude : ce qu'on pourra juger en examinant la nature de l'affaire pas des conjectures, les circonstances et l'occasion.

"3. A l'égard du troisieme point Leurs Hautes Puissances déclarent, que les vaisseaux revenant des ports de Flandres (sans y avoir été jettez par une extreme nécessité) et quoique rencontrez loi de-là dans le canal ou dans le Mer du Nord, pas les vaisseaux de l'état, quand même ils n'auroient pas été vûs ni poursuivis pas ceux ci en sortant delà, seront aussi confisquez à cause que tels navires sont censez avoir été pris sur le fait tant qu'ils, n'ont point achevé ce voyage, et qu'ils ne se sont point sauvez dans quelque port libre, ou apartenant à un prince neutre. Mais ayant été comme il a été dit dans un port libre, et etant pris par les vaisseaux de guerre de l'Etat dans un autre voyage, ces vaisseaux et marchandises ne seront point confisquez; à moins qu'ils n'ayent été en sortant des ports de Flandres suivis par les vaisseaux de guerre, et poursuivis jusques dans un autre port que le leur, ou celui de leur destination, et qu'en sortant de nouveau de là, ils ayent été pris en pleine mer."

In 1689, by a treaty[2] made between Great Britain and Holland, an arrogant claim was asserted to prohibit all commerce between France and other nations, and in effect the treaty declared

[1] Robinson's "Collectanea Maritima," p. 158.
[2] Dumont, Vol. VII, part ii, p. 238.

a general blockade of the French coasts. Clause I ran as follows :—

"Il est conclu et arresté entre Sadite Majeste de la Grande Bretagne et les dits seigneurs Estats Generaux qu'il ne sera pas permis aux sujets dudit roi ni desdits Estats avec leurs propres vaisseaux ni avec les vaisseaux d'aucun autre royaume, pais ou Estat de trafiquer ni de faire aucun Commerce avec les sujets du roi T. C. en manière quelconque, ni ne pourront emmener dans les ports au pais dudit Seigneur roi ou desdits Seigneurs Estats, ni dans aucun autre pais, les marchandises et denrées des pais et terres de l'obeissance du roi T. C. ni amener aux dits pais et terres aucunes marchandises ou denrées quelconques sur peine de confiscation desdites marchandises et denrées et des vaisseaux qui y seront employés.

"II. Et comme plusieurs rois, princes et Estats de la chretienté sont desja en guerre contre le roi T. C. et qu'ils ont desja defendu, ou defendront dans peu, tout commerce avec la France, il est convenu entre sadite Majeste de la Grande Bretagne, et les dits Seigneurs Estats Generaux, que si pendant cette guerre les sujets d'aucun autre roi, prince ou Estat entreprendront de trafiques, ou de faire aucun commerce avec les sujets du roi T. C. ou si leurs vaisseaux et batiments seront rencontrés, faisant voile vers les ports, havres, ou rades de l'obeissance du dit roi T. C. sous un soupçon apparent de vouloir trafiquer avec les sujets dudit roi comme cy-dessus et si les vaisseaux appartenants aux sujets d'aucun autre roi prince ou Estat, seront trouvés en quelque endroit que ce soit, chargés des marchandises ou denrées pour la France, ou pour les sujets du roi T. C., ils seront pris et saisis par les capitaines des vaisseaux de guerre, armateurs ou autres sujets du dit Seigneur roi de la Grande Bretagne et des dits Seigneurs Estats et seront reputés de bonne prise par les juges competans."

The third article of this treaty is interesting, because it provides for notification of the blockade being given by the naval officers of the blockading ships to all ships sailing from neutral countries before publication by their respective sovereigns of a notification of the blockade. The article is as follows :—

"Il est conclu et arresté que le dit Seigneur roi de la Grande Bretagne et les dits seigneurs notifieront au plustost ce traité et accord à tous les rois, princes et Estats de l'Europe, qui ne sont pas en guerre contre la France, et que les dits rois, princes et Estats soient au même tems informés que si leurs vaisseaux ou batiments de leurs sujets sortis en mer avant cette notification, seront trouvés faisant voile vers les ports, havres ou rades de l'obeissance du roi T. C. ils seront obligés par les vaisseaux du dit seigneur roi de la Grande Bretagne et des dits seigneurs Estats de rebrousser chemin incessamment, et que si les vaisseaux ou batiments des dits rois, princes ou Estats ou de leurs sujets seront rencontres faisant voile desdits ports chargés des marchandises ou denrées de France, les dits vaisseaux et batiments seront obligés de s'en retourner aux dits ports et d'y laisser les dites marchandises et denrées à peine de confiscation, et qu'en cas que les vaisseaux ou batiments desdits rois, princes et Estats ou de leurs sujets sortis en mer après la dite notification, seront trouvés faisant voile vers les ports, havres, ou rades de l'obeissance du roi T. C. ou des ports

dudit roi ils seront saisis et confisqués avec leurs marchandises et denrées comme de bonne prise, et quant aux princes et allies, qui sont desja en guerre contre la France, il est aussi arresté et convenu que notification leur sera donnée au plustost de ce que dessus et qu'ils soyent en même tems priés de vouloir, concourir à des moyens si necessaires à l'interest commun et de donner et faire executer des ordres qui tendent à la même fin."

In 1711, Sweden, when at war with Russia, published a declaration[1] prohibiting all commercial intercourse with the ports of the Baltic, then in the possession of Russia. The title of the declaration was :—

"De claudendis atque obsidendis omnibus illis portibus maris Baltici quos Czarus Muscoviæ durante hoc bello occupatos adhuc obtinet."

The first authoritative declaration of what constitutes an effective blockade is to be found at the time of the armed neutrality of 1780, when Article IV of the declaration by Russia set forth as follows what constitutes an effective blockade of a port :—

"Que pour déterminer ce qui caracterise un port bloqué, on n'accorde cette denomination qu'à celui, où il y a, par la disposition de la puissance qui l'attaque, avec des vaisseaux arrêtés et suffissamment proches, un danger évident d'entrer."[2]

Spain, in acceding to this declaration, refers to Article IV in her reply, and points out that the blockade of Gibraltar is effective so as to constitute a real danger to vessels attempting to enter that port.

"Au moyen de la quantité considerable des vaisseaux arrêtés qui forment le blocûs."[3]

Great Britain, in her reply, did[4] not controvert the principle of blockade enunciated in Article IV, but contented herself with observing that she acts conformably to the law of nations and the tenor of her treaty engagements.

France, Sweden, and Denmark assented; the King of Denmark and Norway declaring—

"Qu'on regarde comme un port bloqué celui dans lequel aucun bâtiment ne peut entrer sans un danger évident á cause des vaisseaux de guerre stationnés pour en former de près le blocus effectif."[5]

In 1799, Great Britain made notification to the neutral Powers

[1] Lamberti, Vol. VI.
[2] Martens, "Causes Célèbres," second edition, Vol. III, p. 266; "Recueil," Vol. III, p. 158.
[3] *Ibid.*, "Recueil," p. 165; "Causes Célèbres," p. 272.
[4] "Annual Register," 1780; Vol. XXIII, State Papers, p. 349.
[5] De Martens, "Recueil," *loc. cit.*, p. 179; "Causes Célèbres," *loc cit.*, p. 278.

of a blockade by her of the ports of the United Provinces in these terms :—

"The necessary measures having been taken by His Majesty's commands for the blockade of the ports of the United Provinces, that the said ports are declared to be in a state of blockade, and all vessels which may attempt to enter any of them after this notice will be dealt with according to the principles of the law of nations, and to the stipulations of such treaties subsisting between His Majesty and foreign Powers as may contain provisions applicable to the cases of towns, places, or ports in a state of blockade."[1]

In 1800, Russia and Sweden entered into a treaty[2] in which was embodied Article IV of the declaration of 1780, with the further provision that the officer in command of the blockading vessels should give notification of the existing blockade to those in charge of the neutral vessel, without which there should be no contravention of the blockade. The question of special notification is dealt with elsewhere;[3] it is sufficient to note here that England has never recognized the necessity of such notification as a condition precedent to contravention.

Article III, clause 3, of this treaty is as follows :—

"Que pour determiner ce qui caracterise un port en état de blocus on ne doit comprendre sous cette denomination que celui dont l'entrée est evidemment dangereuse, par suite des dispositions de la puissance qui l'attaque avec des vaisseaux destinés à cette operation, et à une proximité suffisante, et que tout bâtiment qui entre dans un port blocqué ne peut être regardé que comme contrevenant à la présente convention, ainsi que celui qui ayant été préalablement informé de l'état du port par le commandant du blocus, cherche à y penêtrer par violence ou par superchérie."

In the convention with Great Britain of 17 June, 1801, Russia abandoned the pretension set up in 1780 (*supra*) and 1800, and acceded to by the Powers which joined the several armed neutralities, that the blockading vessels should be anchored (*arrêtés*). It was now considered sufficient that they should be anchored *or* (not *and*) sufficiently near to interdict access.[4]

In 1807 a correspondence[5] took place between England and the United States in relation to certain wrongs alleged to have been sustained by American citizens, by irregular and illegal captures and condemnations of their vessels during the blockade of Martinique and Guadeloupe, contrary to the tenor of a letter

[1] State Papers, Vol. XVI, p. 1137; "London Gazette," 26 March, 1799.
[2] Martens, "Recueil des Traités," Vol. VII, p. 518.
[3] See p. 100.
[4] Walker, "Science of International Law," p. 517.
[5] State Papers, Vol. I, part ii, p. 1206.

from the British to the American authorities written in 1804 and which ran as follows :—

"Having communicated to the Lords of the Admiralty, Lord Hawkesbury's letter of the 23rd ultimo, inclosing the copy of a despatch from Mr. Thornton, His Majesty's chargé d'affaires in America, on the subject of the blockade of the islands of Martinique and Guadeloupe, together with the report of the Advocate-General thereon, I have their lordships' commands to acquaint you, for his lordship's information, that they have sent orders to Commodore Hood not to consider any blockade of those islands as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them; and they have also sent the necessary directions on the subject to the judges of the Vice-Admiralty Courts in America and the West Indies."

By the decree of Berlin,[1] Napoleon declared the British territories to be in a state of blockade, and forbade all commerce and even correspondence with Great Britain. He declared that every vessel and cargo which had entered or was found proceeding to a British port, or which under any circumstances had been visited by a British ship of war, should be a lawful prize: he declared all British goods and produce wherever found and however acquired, whether coming from the mother-country or from her colonies, subject to confiscation, and that the flag of all neutral ships that should be found offending against these decrees shall be declared to be denationalized.

In 1807, Great Britain retaliated by an Order in Council, declaring that no neutral vessel should proceed to France or to any of the countries from which, in obedience to the dictates of France, British commerce was excluded, without first touching at a port in Great Britain or her dependencies; at the same time she intimated her readiness to repeal the Orders in Council, whenever France should rescind her decrees and return to the accustomed principles of maritime warfare.[2]

In 1809, the operation of the above Order in Council was limited to a blockade of France and of the countries subjected to her immediate dominion.[3]

The post-Napoleonic blockades commence with a Spanish blockade of the island of Margarita, instituted by the Captain-General of Caracas on 29 January, 1816.[4] The proclamation is a curious one :—

"Don Salvador de Moxo etc., makes known :—That, in consequence of the dispositions taken by H. E. don Pablo Morillo, General in Chief

[1] *Ibid.*, Vol. VIII, p. 466.
[2] *Ibid.*, p. 469.
[3] *Ibid.*, p. 491.
[4] *Ibid.*, Vol. II, p. 1112 (trans.).

of the Expeditionary Army, and Governor and Captain General, for the blockade of the island of Margarita, in order to reduce to their obedience the rebels who, after having been treated with the greatest indulgence and benignity, have dared to rise in arms against the King, it is decreed:— That every Spanish vessel detected by another of the same nation in affording assistance to the insurgents, by carrying men, arms, ammunition, or naval stores, or supplies of any other kind to them, shall be confiscated and forfeited; that the master and the other principal officers on board shall be hung up at the yard-arms; and that, of the sailors and crew, 1 out of 5, if they are not found to be as culpable as the rest, shall be so put to death; otherwise all shall undergo the same fate. A similar punishment shall be applied to any Foreign vessels and their crews; for, as the Spanish nation is in full peace with all other nations, it is not to be expected that they can be permitted to afford assistance to its traitors, which they would not themselves permit under the like circumstances; and all those who offend in this manner must be considered as Pirates and Public Assassins; excepting those who may be on board of vessels, furnished with registers of navigation, with respect to which some limitation must take place. . . .

"Let this be published . . . giving official intimation thereof to the chiefs of the Foreign colonies of Trinidad, Jamaica, Curaçoa, S. Thomas, S. Bartholomew, and to any other Persons as may be thought proper."

It appears that Carthagena had also been blockaded (30 June, 1815),[1] and on 2 March, 1816, the Spanish Minister accredited to the United States intimated[2] that the coast of the Viceroyalty of Santa-Fé[3] was blockaded from Santa Martha to the River Atrato inclusive; and that orders had been given (subject to the ports of S. Martha and Portobello being left open to commerce)—

"That if any vessel be met with further south than the mouths of the Magdalena or further north than the parallel of Cape Tiburon on the Mosquito shore, and between the meridians of these points, she would be declared a good prize, whatever documents or destination she might have."

This was to interdict access to a triangular area of sea of some 3000 square miles extent. The proclamation is confused and illogical, because a vessel could not get to the small enclave south of Tiburon without passing through the interdicted area, and Portobello lies well outside it. The Secretary of State (Monroe) at once repudiated the pretension; though he does not appear to have known of the ferocious threat to kill the officers and crews of blockade-runners.

"I have to state[4] that this proclamation of Gen. Morillo is evidently repugnant to the law of nations, for several reasons, particularly the

[1] State Papers, Vol. II, p. 1114; Vol. IV, p. 479. [2] *Ibid.*, p. 479.
[3] Now the Republic of Colombia.
[4] Monroe to Onis, 20 March 1816, *ibid.*

following—that it declares a coast of several hundred miles to be in a state of blockade, and because it authorizes the seizure of neutral vessels at an unjustifiable distance from the coast. No maxim of the law of nations is better established than that a blockade shall be confined to particular ports, and that an adequate force shall be stationed at each to support it. The force should be stationary, and not a cruising squadron, and placed so near the entrance to the harbour or mouth of the river as to make it evidently dangerous for a vessel to enter. I have to add that a vessel entering the port ought not to be seized, except in returning to it after being warned off by the blockading squadron stationed near it."

Monroe thus substantially lays it down—(1) that a long coast line should not be blockaded; (2) that an area of sea cannot be interdicted; (3) that the blockading force should be stationary and not a cruising squadron; (4) that individual notification by the blockading ships is necessary. In 1862, it will be seen, his successor greatly modified these positions, except the second, which it has been reserved for a later day to infringe.

The Minister, De Onis, in reply,[1] relies on the fact that Carthagena is the only port of entry on the blockaded coast, and that the small force of one ship of the line, two frigates, and several small vessels is adequate to blockade it. He quotes old ordinances regulating the trade of the Spanish Indies, according to which vessels "found near, or evidently shaping a course towards them, were liable to confiscation." Any vessel, he says, found near that coast, or standing towards it—

"can have no other object than to carry on smuggling, or stir up a civil war in the King's dominions: in either case, the laws of nations recommend the seizure of vessels so employed."

So at least he may have imagined; but the Viceroy of Santa-Fé, who expressly disclaimed any knowledge of the law of nations, was perhaps wiser. The United States Minister at Madrid[2] repeated Monroe's view of the law, and observed—

"It is vain . . . to hope that the United States will ever consent to blockades upon the principles of General Morillo; they will acknowledge none to be valid which are not strictly conformable to the well-known principles of public law; principles most clearly defined and quite indisputable, to which the United States have always adhered in their own practice, and to the infringement of which, in any form, in any degree, or under whatever pretext, they have always opposed themselves."

The Spaniards referred him to the Courts of Admiralty, and it is not known whether any redress was ever obtained for the seizure of four vessels captured and confiscated. The blockade was raised on 2 September, 1817.[3]

[1] State Papers, Vol. IV, p. 481 (25 March, 1816).
[2] *Ibid.*, p. 483 (Erving to Cevallos, 26 Sept., 1816).
[3] *Ibid.*, p. 485.

In 1817 Portugal blockaded Pernambuco[1] from 2 April to 6 July.

"RIO JANEIRO, *le 2 Avril*, 1817.

"Le soussigné. . . . annonce au chargé d'affaires de . . . qu'il part aujourd'hui une division composée de 4 bâtimens de guerre, qui vont croiser à la hauteur du gouvernement de Pernambouc, et bloquer étroitement tous les ports du susdit gouvernement militaire, afin de contribuer à réprimer le Rébellion qui a éclaté dans la ville de Recife le 6 du mois passé . . .

"EL CONDE DA BARCA."

In the same year the filibuster MacGregor, purporting to act with the authority of New Granada and Venezuela, issued the following notice, dated 21 August, 1817, blockading the Floridas :—[2]

"Gregor MacGregor, . . . General-in-Chief of the Army destined to emancipate the Provinces of both Floridas, serving under the Commission of the Supreme Governments of Mexico and S. America, etc.

"It being requisite, by the state of the hostile operations undertaken by me against the possessions of the King of Spain . . . and having at my disposal the maritime forces indispensable for carrying into effect a formal blockade :—be it known to all to whom these presents shall come, that, from and after 15 Sept. next ensuing, all ports, rivers, bays, and inlets of the Coasts of both Floridas, from the S. part of this [Amelia] island to the River Perdido, are to be considered in a state of strict and rigorous blockade . . ."

Individual warning was promised. Eventually the United States evicted General MacGregor from his head-quarters (Amelia Island), and the blockade came to an end.[3]

Peru still remaining Spanish, its coast was blockaded by Chili in 1819.[4]

Both the naval commander, Cochrane, and the civil dictator, O'Higgins, issued proclamations; the latter being the more correct. The Admiral's ran :—

"1 March, 1819. Being authorized and commanded by the supreme Government of Chili strictly to blockade the ports, bays, harbours, and the whole coast of the kingdom of Peru, I hereby declare as follows, viz.:—

"(1) That the port of Callao, and all the other ports, bays, and harbours, as well as the line of coast from the port of Guayaquil to Atacama in Peru, are in a state of formal blockade.

"(2) All vessels are strictly prohibited from carrying on any commerce, or holding any communication, with the ports and places within the beforementioned line of blockade.

"(3) No ships or vessels belonging to friendly or neutral Powers, now

[1] State Papers, Vol. IV, p. 980 (trans.).
[2] *Ibid.*, p. 817.
[3] *Ibid.*, Vol. V, p. 490, *et passim*.
[4] *Ibid.*, Vol. VI, p. 1109.

in the Bay of Callao, or in any of the ports or anchorages comprehended within the blockade aforesaid, shall be permitted to sail therefrom after the lapse of eight days from the date hereof.[1]

"(4) No neutral flag shall, in any case, be suffered to cover or neutralize the property of Spaniards, or of the inhabitants of the countries subject to the King of Spain.

"(5) Any neutral vessel navigating under false or double papers, or which shall not have the necessary documents to prove the ownership of the property, shall suffer the penalties applicable to the goods and merchandise of the enemy.

"(6) Neutral vessels which shall have on board military officers, masters, supercargoes, or merchants of the countries subject to the King of Spain, shall be sent to Valparaiso, there to be judged according to the Law of Nations."

Clause 6, threatening to bring vessels in for trial which had on board Spanish merchants, evidently goes too far. And Clause 4, which travels out of the scope of the proclamation in order to contradict the doctrine "Free ships, free goods," was not repeated by the civil dictator. The latter's proclamation ran[2] (after recitals)—

"(1) From 1 March last, all the ports and anchorages in the Pacific Ocean, situated between 21° 48′ and 2° 12′ S. lat.—that is to say, the line of coast from Iquique to Guayaquil inclusive—shall be considered, as they effectively are, blockaded by the squadron of Chili . . . subject to the following regulations:—

"(2) Every neutral vessel, of whatever nation, coming from Europe, the U.S.A., or from any European establishment on the continent or islands of America, which shall attempt to enter any of the ports comprehended in this decree of blockade, within seven months from the same date, shall be notified of the existence of the said blockade by the Commander-in-Chief of the Chilian squadron; and, after this formal notification, shall not be permitted to enter the blockaded ports, nor carry on any commerce or intercourse with them.

"(3) [Substitutes periods of five, six, twelve and three months for vessels coming from Brazil, Africa, Asia, and La Plata respectively.]

"(4) Every neutral vessel, on board of which shall be found warlike stores or enemies' property, or officers, masters, supercargoes, or merchants, belonging to the countries under the dominion of the King of Spain, shall be sent to Valparaiso, there to be judged according to the Law of Nations.

"(5) As sufficient time has been given, in the 2nd and 3rd Articles of this decree, to all neutral and friendly vessels, under whatever flag they may arrive, to avoid the ports thus blockaded, any such vessel which shall be found before any of the blockaded ports, after the expiration of the periods respectively appointed, shall be sent to Valparaiso, there to be judged according to the Law of Nations.

[1] Except in ballast (?).
[2] State Papers, Vol. VI, p. 1110 (20 April, 1819).

"(6) Every neutral vessel, which shall be found navigating with double or false papers, and which does not possess the necessary documents to establish the ownership of the property, shall suffer the penalties applicable to the goods and merchandise of the enemy."

As the Spanish-American struggle progressed, the portion of Colombia still retained by Spain was, in its turn, blockaded (6 July, 1820).[1] At about the same time (28 January, 1820) domestic troubles impelled Spain to blockade the mouth of the River Santi Petri.[2] This forms the port of S. Fernando, which lies at the neck of the peninsula on which Cadiz stands. Both these blockades were proclaimed in very succinct terms. No special delays were afforded, nor was anything said as to notification.

In this year Turkey blockaded part of its own Grecian coast.[3] The Government of the Ionian Islands issued a careful explanation of the duties of foreigners in these circumstances. The blockade extended all along the coast, from Missolonghi to Avlona, i.e. for about 150 miles north-west of the Gulf of Corinth. It is stated that Parga and Prevesa were "strictly" blockaded; Missolonghi, up to S. Maura and Gumenizza and Avlona, entirely open; and Sagiades, Buccintro, and the other ports in their vicinity, open only for export of provisions and cattle. This sounds confusing: for how could it be determined what the status was of parts of the coast not expressly mentioned? The relaxation, permitting the export of provisions, also seems irregular, for it could not but lead to misapprehensions by neutrals. Neutrals might lose the benefit of a cessation of the blockade, for they would probably conclude that the vessels which came through had provisions only on board; or they might be deceived into thinking the blockade raised on observing these privileged vessels come through. Ships were only allowed to stay in the ports last mentioned for thirty-six hours, and might not carry passengers.

In 1821 this blockade was superseded by a more regular one, notified by the Turkish admiral to the Ionian Commissioner.[4] It extended to the whole of the Morea, except Naupacto, Patras, Navarino, Modon, Coron, and Monembassia. The Ionian Senate expressly enjoined its observance on its subjects—an uncommon step; and the Commissioner (Sir Thos. Maitland), in language of unusual character for an official proclamation, severely reflected on the partisans of Greek independence.

The progress of the war of liberation in S. America led to the organization of an independent government in Peru, which proceeded to blockade the Peruvian ports still in Spanish hands.[5]

[1] State Papers, Vol. VII, p. 979.
[2] *Ibid.*
[3] *Ibid.*, p. 895.
[4] *Ibid.*, Vol. VIII, p. 1282.
[5] *Ibid.*, Vol. IX, p. 804.

"Article I. The ports and creeks comprehended between the parallels of 15° and 22° 30′ S., from the Port of Caballas or Nasca to that of Cobija, both included, shall be considered to be in a state of rigorous blockade, so soon as the Peruvian ships of war intended to render it effective, and which are nearly ready to sail, shall arrive on that coast.

"Article II. This declaration will be considered as sufficiently notified to all friendly or neutral Powers at the periods specified in the following article, after which no traffic can be carried on with the before-mentioned ports, except under the responsibilities which the Law of Nations imposes in the event of any infraction thereof.

"Article III. [Fixes various periods, ranging from two to twelve months, but fixes no date to reckon them from.]

"Article IV. From the day on which the destined force shall render the blockade effective, no ship belonging to friendly or neutral nations can enter the before-mentioned ports; and the commanding officer of the blockade will notify its existence to those who may arrive before then, according to the verification thereof on the back of the licence of the ship, in order that, should it afterwards attempt to enter a blockaded port, it may be sent to Callao, and judged accordingly.

"Article V. Every ship which shall arrive at the said blockaded ports, after the expiration of the terms [above-mentioned], and which shall have on board articles contraband of war, such as arms, ammunition, warlike stores, provisions, naval stores, and other supplies which might contribute to the defence of the enemy and the continuance of the war, shall be sent to the port of Callao, to be judged according to the Law of Nations.

"Article VI. Vessels arriving at the said ports without the necessary documents, or with simulated ones, are subject to the foregoing article. . . . Lima, 15 Oct., 1821."

It seems, therefore, that access for some purposes was to be allowed, Article V only specifying contraband and other suspicious cargoes as interdicted, and Article VI extending the penalty to the use of false papers. Otherwise Article V is regrettably ambiguous, and Article VI is entirely unnecessary.

On 25 March, 1822, revolted Greece blockaded certain Turkish ports by a declaration notified to foreign consuls. The blockade comprised—[1]

"Tous les parages qui sont encore au pouvoir de l'ennemi, dans l'Epire, dans le Peloponèse, dans l'Ile de Négrepont, en Thessalie, depuis Epidaure (Dulcino) jusqu'à Salonique, même y compris les Iles de la Mer Egée, celles des Sporades qui sont entre leurs mains, et Candie."

Special notification was promised—

"jusqu'à ce que le gouvernment soit informé que la présente publication est parvenue à qui de droit."

The admirals of Britain, France, and Russia, on 24 October,

[1] *Ibid.*, Vol. IX, p. 798.

1827, intimated to the Greek Legislature that its blockades must be limited to the coast from Volo to Lepanto (including Salamina, Egina, Hydra, and Spezia).[1]

Much correspondence passed between the United States naval authorities and the Governor of Porto Rico, in 1822, on the subject of General Morillo's blockade.[2] A Spanish vessel employed in its maintenance fired by mistake into a United States cruiser, and was sunk by her. The British, Dutch, and United States authorities further entered formal protests against the validity[3] of this blockade, the Dutch protest being especially well stated.

Brazil blockaded the last stronghold of the Portuguese, Bahia, in 1823 (29 March).

"The entry of all vessels whatever, national or foreign, men-of-war or merchant vessels, is henceforth prohibited, for so long as the Portuguese troops shall continue there."[4]

France, in the same year, blockaded Cadiz, Barcelona, Santona, and S. Sebastian. She seems to have thought any notification whatever a trivial formality, according to Chateaubriand's circular to foreign ministers.[5]

"PARIS, 24 *Juillet*, 1823.

"Monsieur, le gouvernement Français, fidèle aux principes de générosité qu'il a manifestée, en ne délivrant pas de lettres de marque et en laissant passer librement tous les bâtiments de commerce, avait cru qu'il n'avait pas besoin de signifier le blocus effectif des ports d'Espagne devant lesquels il a établi des croisières. Il avait pensé que les droits de la guerre et des nations étaient assez connus, et que la conduite loyale de la France serait assez appréciée, pour qu'on ne cherchât pas à forcer les blocus qu'il a formés, et à ravitailler les places assiégées par les forces de terre et de mer de S. M. Très-Chrétienne. L'expérience a démontré au gouvernement français qu'il s'était trompé; tous les jours, des bâtimens sous différent pavillons, essayent d'introduire des vivres et des munitions dans les ports de Cadix, de Barcelone, de Santona et de San Sébastièn. *Plusieurs de ces bâtimens, surtout à Cadix, ont été arrêtés par les vaisseaux du roi. Leurs cargaisons ont été mises à dépôt.*[6] Le gouvernement de S. M., desirant qu'à l'avenir, les sujets des puissances neutres ne s'exposent plus à ces inconvéniens, en dirigeant des expéditions commerciales sur les ports bloqués, se voit forcé de déclarer le blocus effectif des ports de Cadix, Barcelone, Santona et S. Sébastien. . . ."

This blockade was extended to Ferrol and Coruña, 26 July, 1823, and was raised 7 October (as to Ferrol, 3 August).[7]

[1] State Papers, Vol. XIV, p. 1226.
[2] *Ibid.*, Vol. IX, p. 977 *et seq.*
[3] *Ibid.*, Vol. X, p. 939 *et seq.*
[4] *Ibid.*, p. 947.
[5] *Ibid.*, p. 936.
[6] Italics ours.
[7] *Ibid.*, p. 937.

Mexico blockaded the castle of Ulloa, the last foothold of Spain in continental America, on 8 October, 1823.[1]

Algiers was blockaded by Great Britain on 13 April, 1824, and the blockade was signified to the ministers of foreign Powers in London.[2]

The Greek Government blockaded the castles of Patras and Lepanto in 1824 (14 October).[3]

"Article I. Il est défendu à toute espèce de bâtiment, quelque pavillon qu'il porte, d'entrer dans les chateaux de Patras et de Lépante.

"Article II. Après la promulgation de la présente proclamation, le commandant de la division navale Grecque, ou tout Capitaine de vaisseau sous ses ordres, sera tenu de défendre, pour la première fois, à tout bâtiment qui se dirige vers les places bloquées, et dont il est prouvé que la cargaison n'est point une propriété Turque, d'entrer dans lesdites places: il lui delivrira un certificat par écrit, qu'il a été sommé de rebrousser chemin; mais il devra arrêter et traduire devant le tribunal compétent, ceux des bâtimens qui se trouveraient là après un terme tellement postérieur à la promulgation de la présente proclamation, que l'on doive présumer qu'ils ont eu connaissance du blocus.

"Article III. Tous les bâtimens, portant pavillon neutre, qui se trouvent dans les deux dites places bloquées, peuvent en sortir librement dans le délai de 3 semaines, à compter du jour de l'apparition de la division navale grecque devant ces places, mais sans emporter des propriétés turques . . ."

Brazil declared a blockade of Buenos Ayres and the Banda Oriental (now Uruguay) in 1825. Fourteen days were allowed for exit, after which exit was allowed of ships in ballast, "provided they have not any suspicious Persons on board." The declaration was issued by the naval commander, Admiral Lobo,[4] on 21 December, but notice was communicated to the ministers at Rio a fortnight previously.[5] Against the manner in which the blockade was conducted, the United States minister at Buenos Ayres protested.[6] One frigate, one corvette, and three brigs were supposed to blockade a coast extending for twenty degrees of latitude, and the minister instanced six vessels which (in about eight weeks) had entered the blockaded port of Buenos Ayres. Captain Elliott (U.S. "Cyane") enforced the view of his Government in even stronger language, and insisted on his right to take his vessel to Buenos Ayres:—

"The United States will not acknowledge a blockade as valid against its civil marine, unless confined to particular ports, each one having *stationed*

[1] State Papers, Vol. X, p. 1027.
[2] *Ibid.*, Vol. XI, p. 185.
[3] *Ibid.*, Vol. XII, p. 903.
[4] *Ibid.*, Vol. XIII, p. 783.
[5] *Ibid.*, p. 1029.
[6] *Ibid.*, p. 823, Forbes to Lobo, 13 February, 1826.

before it a force sufficiently great to prevent the entry of all vessels carrying materials to succour the besieged; and no vessel shall be seized in attempting to enter the port so blockaded, till she has been previously warned off, and the fact endorsed on her register."[1]

To this Admiral Lobo replied that—

"In order to blockade a port, it is not necessary that we should always be in sight of it; it is sufficient to cruise in that place which forms the entrance to it; for example, the undersigned can blockade Buenos Ayres, being east of the Ortis and Chico Banks. . . ."[2]

The French Admiral, Rosamel, had a similar correspondence with Admiral Lobo's successor.[3] Mr. Raguet (United States minister at Rio) took up the same position as Captain Elliott and the minister at Buenos Ayres,[4] and, with regard to the exclusion of warships, maintained that—

"Had any serious intention existed at any time on the part of the Brazilian ministry to attempt a measure so clearly at variance with the established laws of nations, . . . I should not have failed to resist the doctrine as wholly inadmissible by the United States, and at the same time to have given notice that any attempt to impede the entry into a blockaded port of an American ship of war, would be resisted by force."[5]

He addressed a long essay on the subject of blockade to the Brazilian Government, which does not touch on the alleged rights of warships, and is characterized by great lucidity and correctness as an exposition of the ancient United States doctrine.[6] The blockade was restricted to La Plata, 28 April, 1826.[7] It seems always to have been regarded as valid as against Buenos Ayres, though the discrepancy between the proclamation and the fact might fairly have invalidated it *in toto*.

Regarding the alleged right of vessels of war to break blockade, Baron do Rio da Prata, the then Brazilian Admiral, in a letter of 10 November, 1827,[8] repudiated any such doctrine, and explained the permission accorded to a British public vessel to touch at Buenos Ayres, as due to the fact that she was on a mission of mediation. The United States Commodore retorted[9] that—

"Blockades have never been deemed to extend to public ships. Great Britain, almost perpetually at war, and numerically superior at sea to any other nation, never for a moment pretended that neutral ships of

[1] State Papers, Vol. XIII, p. 824, Elliott to Lobo, 3 April, 1826.
[2] *Ibid.*, p. 827, Lobo to Elliott, 6 April, 1826.
[3] *Ibid.*, p. 832 *et seq.*
[4] *Ibid.*, Vol. XIV, p. 1167.
[5] *Ibid.*, p. 1169, Raguet to Elliott, 18 March, 1826.
[6] *Ibid.*, Raguet to St. Amaro, 13 December, 1825.
[7] *Ibid.*, p. 1187.
[8] *Ibid.*, Vol. XV, p. 1118.
[9] *Ibid.*, p. 1120.

war could be affected by blockades. . . . In 1811, in the U.S. ship the 'Hornet,' I myself went into Cherbourg, then blockaded by a British squadron."

In a subsequent letter he added—[1]

"The usage of nations is not to apply a blockade to ships of war; and this usage is conformable to reason, since the legitimate and only object of a blockade is to exclude supplies; and your Excellency well knows that a ship of war never carries supplies of any kind, except for her own use. I beg leave to state . . . that in 1811, while in command of the U.S. sloop-of-war 'Ontario,' I entered the port of Valparaiso, then blockaded by a Spanish squadron. The Spanish Commodore notified to me the blockade, and requested I would acknowledge the notification of it, which I accordingly did in writing.

"In 1819 the U.S. frigate 'Macedonian' entered the port of Callao, then blockaded by the Chili squadron commanded by Lord Cochrane, who boarded the 'Macedonian' as she went in.

"In 1802, I was a junior officer in the American squadron then blockading the port of Tripoli. A Danish frigate came off the port, which our squadron boarded and permitted to enter. . . ."

The Brazilians having begun to take bonds from neutral vessels, that they would not violate the blockade of Buenos Ayres, Henry Clay wrote to the United States chargé d'affaires as follows:—

"That measure can find no justification whatever in the usage or law of nations. . . . A blockade must execute itself. The presence of the force which constitutes it is the means of its enforcement. The belligerent has no right to resort to any subsidiary means. Such a resort is a tacit admission of the incompetency of the blockading force to sustain the blockade, and consequently confesses its illegality."[2]

Voluminous further correspondence passing between the authorities of Brazil and the United States on the subject of this blockade, is set out in the British State Papers, Vol. XVI, pp. 1099–1160. It seems that, at one time, Brazil asserted the position—

"that the blockade existed as soon as adequate notice of it was given to all nations, and that a sufficient space of time was allowed for all to be informed of it. Neutral vessels, therefore, cannot be allowed to attempt a violation of the blockade upon the pretence of being ignorant whether it existed or not."[3]

But it also seems that some relaxation, similar to that allowed to United States ships in the Napoleonic wars, conceding a liberty of inquiry, was eventually allowed.[4]

"The custom adopted by this navy towards neutral vessels, in the act of violating a blockade, being founded on mere favour, is very far from

[1] State Papers, Vol. XV, p. 1123.
[2] *Ibid.*, p. 1135, Clay to Tudor, 1 April, 1828.
[3] Inhambupe to Raguet, 10 December, 1826.
[4] State Papers, Vol. XVI, pp. 1141–3, and cf. *ibid.*, XIV, p. 1187.

being a maritime right: so that it may be withdrawn, since, in such a case, being a favour, its duration depends on the will of H.M. the Emperor of Brazil, who grants it."

The differences of opinion, perhaps partly due to difficulties of language, produced much friction—the United States officers contending for the absolute necessity of individual warning, the Brazilians considering that all that was intended was the concession of liberty to neutral vessels to approach the neighbouring unblockaded ports, or to report themselves to the blockading squadron for the purpose of candid inquiry.

It may perhaps be added here, that the United States naval commander wrote, with reference to relaxations in the blockade which had been made in favour of Brazilians:—[1]

"H.I.M. is too just and too enlightened to expect that, while he permits to his own subjects trade with his enemies, he may deny it to neutrals. It would be extraordinary indeed if a belligerent is to be exempt from all the evils of his own blockade, while all its evils are to be enforced against neutrals, thereby placing the neutral in a worse condition than the belligerent. These relaxations must also render the blockade entirely null and illegal."

France obtained an indemnity for the seizure of three ships by Brazil, and by a Franco-Brazilian treaty of 21 August, 1828, formal provision was made for individual notification by the blockading forces of either Power.[2]

The West Coast of Africa, from Camelay to C. Mount, was blockaded from 4 March, 1826, to 13 January, 1827,[3] by proclamation of the Governor to the Gold Coast. It recites with much detail the circumstances which called forth its appearance; with an incidental disquisition on the evils of the slave-trade, and another on the duties of government, otherwise it does not differ much from more modern documents.

France blockaded Algiers on 2 July, 1827,[4] and the blockade was still in force on 13 September, 1828.[5] On 9 February, 1830, it extended to Bona, Bugia, Algiers, and Oran.[6]

In 1828 the King of Portugal blockaded Oporto (22 May to 13 July).[7] Two ships of war, "according to the maritime laws," were employed. Due notifications to foreign Powers were made at Lisbon. Funchal, in Madeira, was also blockaded, the notification (issued by the Portuguese Board of Trade, 26 July) stating that ships had been despatched for the purpose. This blockade

[1] State Papers, Vol. XVII, p. 1139 (13 December, 1827).
[2] *Ibid.*, Vol. XV, pp. 1240, 1242.
[3] *Ibid.*, Vol. LXIII, p. 1163.
[4] *Ibid.*, Vol. XIV, p. 863.
[5] *Ibid.*, Vol. XVI, p. 1253.
[6] *Ibid.*, Vol. XVII, p. 1261.
[7] *Ibid.*, Vol. XV, p. 1091 *et seq.*

was raised by the capture of Madeira, intimation of which was made to the foreign ministers in Lisbon on 12 September.

Later in the same year a curious situation arose, when Russia declared war against Turkey and desired to blockade Constantinople. As the Emperor of Russia had publicly declared an intention to waive his belligerent rights in the Mediterranean (where he was acting in concert with France and Britain), Lord Aberdeen issued a circular declaring that commercial enterprises undertaken on the faith of this promise could not be affected by the blockade,[1] and subsequently stated[2] that vessels which cleared from British ports before 1 October, or from Mediterranean ports before 30 October, would not be obstructed. The blockade itself was commenced on the $\frac{6}{18}$ October, and notified by the Russian Admiral to the neutral naval commanders.

"L'Empereur . . . m'a ordonné, de mettre et de déclarer en état de blocus les Dardanelles et Constantinople, et d'empêcher l'arrivée quelconque des vivres et autres articles généralement connus sous la dénomination de contrebande de guerre, à bord des bâtimens turcs ou de pavillons neutres. . . . S. M. autorise son escadre.

"(1) A permettre l'entrée des Dardanelles et de Constantinople à tous les bâtimens neutres qui se soumettront à la visite, et qui n'auront à leur bord ni contrebande de guerre ni aucun autre objet qui servirait à approvisionner la capitale de l'empire Ottoman.

"(2) A permettre la sortie, sans être molestés, de tous les bâtimens provenant de Constantinople et allant en Europe. . . .

"(3) A ne faire usage de la force qu'à le dernière extrémité contre les bâtimens neutres qui voudraient se soustraire à la visite, ou bien qui tenteraient violer de blocus."

On 19 December, Russia further declared a blockade of the Bosphorus.[3]

"Le commerce est informé que l'Amiral Greig, Commandant de notre Flotte dans la mer Noire, vient de recevoir l'ordre de déclarer le Bosphore en état de blocus, et de ne laisser sortir de ce détroit ou y entrer, que les vaisseaux qui le passeraient pour se rendre dans un des ports russes de la mer Noire, ou qui, expédiés d'un de ces ports, et n'étant par conséquent chargés ni de blé, ni de contrebande de guerre, auraient ce même détroit à traverser.

"Les articles désignés sous le nom de contrebande de guerre sont les suivants—les armes, projectiles, poudre, salpêtre, souffre, ceinturons, gibernes, selles et brides. . . ."

This curious attempt at a semi-blockade is worth attention. Russia apparently desired to stop the trade of Turkey without interfering with her own. With regard to the blockade of the Dardanelles, Lord Aberdeen wrote to the British Ambassador in

[1] State Papers, Vol. XV, p. 1107. [2] *Ibid.*, p. 1109.
[3] *Ibid.*, Vol. XVI, p. 1250.

Russia, "endeavouring to recall His Imperial Majesty to a sense of his engagements," and suggested that exemption should be accorded to British ships which had cleared for Constantinople on the faith of the declarations of the Emperor and his allies.[1] But the subsequent unnotified extension of the limits of the blockade by Rear-Admiral Ricord was received with further energetic protests, and was immediately withdrawn.[2]

Tangier was blockaded by Britain in 1828 (24 November to 22 January, 1829),[3] notification being published by the Governor of Gibraltar, and by British representatives abroad.

Peru blockaded the Pacific ports of Colombia, 9 September, 1828.[4]

"(1) The Ports and Creeks between the parallels of 3° 6′ S. and 9° N., i.e. from Tumbes (exclusive) to the port of Panamá, are declared in a state of rigorous blockade."

The remaining articles are virtually identical with articles 2 to 6 of the Peruvian blockade of 1821,[5] with the addition of—

"(7) The Commanders of the ships of war intended to maintain the blockade shall direct all vessels which they may find anchored in the ports comprised within the before-mentioned latitudes, to depart from there within the number of hours which they may prescribe to them with reference to the circumstances of the case; it being understood that, should they exceed the time allowed, or proceed to any other blockaded port, they will be detained and sent to Callao for adjudication."

On 18 March, 1828, the Greek Government had empowered General Church to establish a blockade of the Ambracian Gulf.[6]

"En déclarant le blocus, il aura soin de défendre la saisie de tout navire ou bateau neutre pendant les premières deux semaines après le publication de sa déclaration. Pendant cette intervalle, les navires ou bateaux neutres, qui se dirigent avec un cargaison dans le golphe d'Ambracie, seront seulement détournés de leur direction et renvoyés libres."

At the same time, a blockade of Coron, Modon, and Navarino was established.

"(1) Une division navale, composée de 8 bricks et goëlettes de guerre, et d'un certain nombre de barques cannonières et d'autres bateaux armés, est destinée à intercepter l'arrivée des vivres, des munitions et de tout autre objet de contrebande de guerre, dans les places de Candie occupées par les turcs; à maintenir le blocus le plus sévère devant les places de Coron de Modon et de Navarin; et à renforcer celui déjà existant devant le golfe de Patras et de Lepante. . . .

"(4) [L'amiral Sachtouris] ne permettra pas, . . . l'entrée d'aucun

[1] State Papers, Vol. XVII, p. 385.
[2] *Ibid.*, p. 392.
[3] *Ibid.*, Vol. XV, p. 1091.
[4] *Ibid.*, Vol. XVI, p. 1199.
[5] *Supra*, p. 131.
[6] State Papers, Vol. XVI, p. 1209.

bâtiment, ou de tout autre navire de commerce, sous pavillon neutre, dans les ports et rades susmentionnés.

"(5) Il arrêtera, . . . tous ceux parmi les bâtimens, ou autres navires de commerce neutres, qui se dirigeront vers les dits ports et rades, avec une cargaison de provisions, de munitions, ou de tout autre objet de contrebande de guerre, et il les expédiera au siège du gouvernement, afin d'être jugé. . . .

"(6) Sont exceptés les bâtimens, ou navires de commerce neutres, dirigés vers les places de Candie. Ceux-ci seront seulement détournés de leur direction dans les premières trois semaines après la publication du présent décret, s'ils viennent des Iles Ioniennes, ou des côtes du royaume de Naples; et pendant les six semaines . . . s'ils viennent des côtes de France ou de l'Adriatique; et ils ne seront saisis et envoyés au siège du gouvernement qu'après l'expiration de ce terme, s'ils se trouvent chargés des provisions, des munitions, ou d'autre contrebande de guerre. . . ."

Again, on 31 May, 1828, the coasts of Eubœa and the Gulf of Volo were placed under blockade.[1] Like the other proclamations, this only ordered vessels to be turned back, unless carrying provisions or contraband of war, to which the present proclamation added, "enemy property." By Article III, no vessel is to be allowed to pass the blockade; by Article IV, such vessels, if carrying these special cargoes, are to be seized; by Article V, which is a little ambiguous—

"Les bâtimens susmentionnés" [i.e. probably, those with cargoes of contraband, etc.], "portant pavillon neutre, qui seraient rencontrés . . . . dans les dix jours après cette date, seront détournés de leur direction, sans être molestés. S'ils seraient rencontrés après l'expiration de ce terme, ils seront arrêtés, et expédiés au tribunel competent, conformèment à l'article précédent."

Article VI ran :—

"Il n'est pas permis à cette division navale d'arrêter les batimens neutres rencontrés de plus de 10 milles de la côte de la Grèce, et au sud de l'Eubée."

Similar, though less definite, limitations were put on the other Greek blockades, owing to the pressure of the Allied Powers.

On 8 May, 1829, the coast of Demetriadi (Zagora) up to Cape Kissamos was declared under blockade.[2] In this case a period (twenty days) was allowed for exit. By Article III—

"Tout bâtiment ayant pavillon neutre, et se dirigeant vers les côtes mises par la présente en état de blocus, ne sera pas saisie pour le première fois, il ne sera que détourné de sa direction; mais s'il ose tenter une seconde fois de forcer le blocus, il sera alors arrêté et envoyé devant le tribunal maritime."

[1] State Papers, Vol. XVI, p. 1212.
[2] *Ibid.*, p. 1213.

It will be seen that the complications of particular treatment of vessels carrying contraband and provisions were not introduced.

Attica seems already to have been blockaded.

The blockade of western Greece was extended to Albania on the same day, as far as Mourto. A twenty days' delay was granted for exit, and the proclamation also resembled the last-mentioned in other respects.

Those two blockades were repudiated by the British and Ionian Governments,[1] not on the ground of any alleged nonconformity with the rules of blockade, but because Great Britain was engaged in mediation between Greece and Turkey.

Lord Aberdeen, in the course of a long despatch,[2] said:—

"Great Britain is the Power which, of all others, gives the greatest facility to the execution of blockades by belligerent states. At all events, H.M. was the first to recognize the belligerent rights of the Greek insurgents, by the acknowledgment of the blockades instituted by their naval forces. The principle which regulates this conduct is simple and obvious. It is conceived that those belligerents who have the power of carrying on a maritime warfare, have also the right to blockade the ports of their enemies.

"The establishment of a blockade being an act of war by a competent authority, we must either respect such blockade, or treat as pirates those who attempt to enforce it. . . . The peculiar nature, however, of the Greek war, especially in its present state, offers a new case, to which it is necessary to apply the principle with some modification.

"The Allied Powers assumed to themselves the right of putting an end to the war between Turks and Greeks. . . . The Greeks, having previously accepted the mediation, and called for the interference of the allies, may be presumed to yield obedience to this decision. . . . In this case, the assumption and exercise of an authority by the allies to put an end to a state of warfare in the Levant, suspends the belligerent character of the parties, and the rights of H.M. subjects naturally revive."

In consequence, Lord Aberdeen expressed surprise that the French Government should consider it improper to refuse to recognize the Greek blockades beyond the limits of the Morea and Cyclades: and Captain Spencer, of H.M.S. "Madagascar," intimated at a personal interview to Capo d'Istrias and Admiral Miaoulis, that they must not enforce their proposed blockade.[3]

The interesting question of the effect on a blockade of an interruption such as this on the part of a single Power for the benefit of its own vessels solely, cannot be said to admit of a positive answer. Probably it must be assimilated to a dispersal of the blockading force by tempest; but there are no outward and visible signs as in that case, to serve as a guide to other

[1] State Papers, Vol. XVI, pp. 1214, 1215.

[2] *Ibid.*, Vol. XVII, p. 400, Aberdeen to Stuart de Rothesay, 30 June, 1829. See also *ibid.*, p. 433.

[3] *Ibid.*, p. 433-46.

parties, unless the interfering vessels actually remain on the spot. It is quite possible, therefore, that such an occurrence amounts to a forced raising of the blockade; for which the blockading State must settle with the intrusive Government.

Holland, on the occasion of the revolt of Belgium, blockaded Antwerp, Ghent, and West Flanders, 7 November to 25 November, 1830.

"Article I. The coast of the kingdom of the Netherlands belonging to the province of West Flanders, together with the ports thereof, as well as the ports of Antwerp and Ghent, are hereby declared to be in a state of blockade.

"Article II. Ships bound to [those] ports shall be warned off, but permitted to enter any port of the Northern Netherlands or to proceed elsewhere. With regard to the vessels which, after being apprised of the blockade, shall notwithstanding endeavour to enter any Southern Netherlands port, they shall be dealt with according to the law of nations. . . ."[1]

On 24 April, 1831, the Turkish Government intimated a blockade of the ports of the province of Scutari in Albania.[2] It seems also[3] to have declared (under municipal law) that—

"l'accés de ce littoral serait interdit à tous les bâtimens étrangers soit de guerre, soit marchands, soit chargés, soit simplement sur lest jusqu'à ce que le blocus puisse être révoqué."

The limits were from Durazzo to the Turkish frontier on the Gulf of Venice.

In 1832 (6 April) Donna Maria's forces blockaded Madeira. Admiral Sartorius, the Queen's naval commander, notified the fact to the consuls on the spot.[4] Subsequently[5] they blockaded Lisbon and Setuval (19 July, 1832), the notification being posted up at Oporto by the Duke of Braganza, acting as Regent. On 3 August it was notified in London that the Madeira blockade had been discontinued, and that the Tagus and St. Ubes were now blockaded.[6]

In reply, King Miguel blockaded Oporto[6] (12 September).

On 29 June, 1833, the Queen declared a blockade of the whole coast of Portugal "subject to the intrusive Government,"[7] reciting that her forces were sufficient, and expressly exempting both "the ships of war of friendly nations, and packets."

It seems that even Lisbon was not yet effectively blockaded, for the Chevalier de Lima intimated to the British Government (15 July, 1833) that orders had been given for the immediate establishment of such a blockade.[8]

[1] State Papers, Vol. XVII, pp. 1282–3.
[2] *Ibid.*, Vol. XVIII, p. 441.
[3] *Ibid.*, Vol. XIX, p. 1435.
[4] *Ibid.*, p. 1425.
[5] *Ibid.*, p. 1426.
[6] *Ibid.*
[7] *Ibid.*, Vol. XX, p. 1365.
[8] *Ibid.*

On 7 April, 1834, Peru blockaded some of her own ports. Reciting that the capital of Arequipa was in insurgent hands, the proclamation decreed (not imitating the minute proclamations of 1821 and 1828)—[1]

"Article I. That all the ports, roads, bays, and creeks situated between Atico and Ilo are declared to be in a state of blockade.

"Article II. That, so long as circumstances do not allow the repeal of the present decree, all introduction into the interior of goods or merchandise of what kind soever, as well as the entrance into the said port, roads, etc., of any vessel, whether belonging to this republic or to any other nation, are absolutely and strictly forbidden."

On 6 May this was extended to the port of Islay, in a somewhat more detailed way, allowing a short period for egress and providing for individual notification.

These decrees were repealed 28 May, 1834.[2]

Spain blockaded her northern ports, from C. Finisterre to the mouth of the Bidassoa, in 1834, issuing a proclamation which at first took this form :—

"Every vessel that shall be found laden with arms, warlike stores, ammunition, or other articles contraband of war, provided that such vessel shall approach the said coast within six miles, manifesting, by that act alone, her intention and design to disembark the above-mentioned articles, shall be considered to be suspected of the above hostile intention, and shall be detained, and the arms and warlike stores which she carries shall be embargoed until a further decision shall be adopted, according to the importance and the circumstances of the case."[3]

In so far as the decree authorized the capture of contraband of war, it was not necessary; in so far as it purported to infer an improper destination from the fact of the ships being within six miles of the shore, it was clearly illegal. The attention of the Spanish Government seems to have been drawn to this circumstance, and it issued an additional decree (without prejudice to that of 21 August), simply declaring a blockade of the coast in question, and adding—

"My First Secretary of State shall communicate this royal decree to the Diplomatic and Consular agents of my august daughter, to the end that, in consequence of his having given it the requisite publicity, no one may have to plead ignorance."

This clearly excluded the necessity for individual notification.

In the course of the blockade much inconvenience was caused to legitimate Spanish trade, and a relaxation was granted on

[1] *Supra*, p. 138.
[2] State Papers, Vol. XXIII, pp. 786–8.
[3] *Ibid.*, p. 903 (21 August).

11 December to all Spanish vessels bound to Coruña, Gijon, Santander, and Bilbao, but on condition that they carried no contraband of war; and declarations were to be made before the Spanish Consuls at the port of export verifying this, and security was at the same time to be given. These declarations were to be transmitted to the Spanish authorities at the four ports, from which it appears that these ports were actually in the hands of the legitimate Government.[1] Of course, any blockade of them was therefore altogether impossible and unlawful. As the purported relaxation applied only to Spanish vessels, other nations claimed a similar "concession," which was granted in the case of Britain on 11 February, 1835.[2] On 17 February foreign vessels were exempted from giving security.[3] But it is clear that the blockade was altogether invalid, because parts of the coast proclaimed as blockaded were incapable of being blockaded (being in the blockaders' hands). At any rate, it was invalid as to the four ports in Government hands, and the conditions annexed to the supposed licence to trade with them were altogether improper (except so far as they could be municipally enforced). Spain forgot with difficulty her ancient sweeping pretensions to interdict commerce with her territories by action far out on the high seas.

Samos was blockaded by Turkey, 31 March to 9 September, 1834.[4]

Tripoli blockaded its own coast (except Tripoli, Bengazi, and Derna) on 9 August, 1835.

"Esseit Mustapha Nejîb, by the Grace of God Pasha Vizier of the Sublime Ottoman Porte . . . to Hanmer Warrington, H.B.M. Consul-General at Tripoli.

"Sir. . . . You will have the goodness to inform those of your countrymen, and all others whom it may concern, that henceforth all coasting traffic is expressly forbidden, and that no commercial intercourse will be allowed at any other places than the ports of Tripoli, Bengazi, or Derna; and consequently, that from 1 September, 1835, all vessels, boats, craft, etc., which may be found in the prohibited places, will be seized, it being declared that the whole of this coast is, from this moment, to be regarded as in a state of blockade, exempting only the three ports above mentioned. . . ."[5]

Withdrawal of this measure was announced in London on 16 December.

On 14 July, 1835, the Porte blockaded the ports of the coast of Albania.

"The Sublime Porte . . . has detached a sufficient number of ships of war of the Imperial Navy, which have proceeded to blockade Bovana, Durazzo, Lesche, Morton, and Cevania. . . .

[1] State Papers, Vol. XXIII, p. 906. [2] *Ibid.*, p. 907.
[3] *Ibid.* [4] *Ibid.*, p. 741. [5] *Ibid.*, p. 740.

"A suitable period has been fixed of thirty-one days. . . (from 17 July, 1835), beyond which no merchant ship or other vessel shall be permitted to resort to the ports above mentioned; and in order to prevent all complaints which might arise from vessels [in ballast?] repairing to the places in question, no vessel, with or without cargo, and of whatever nature the cargo may be, will be permitted to touch at those parts of the coast of Albania before mentioned, after the expiration of the period above stated. . . .

"It being necessary to notify this blockade which we are about to establish to the representatives of all friendly Powers residing at Constantinople, in order that they may make it known to the merchants and subjects of their respective nations with the least possible delay, and that the necessary orders may be issued that no merchant vessel or ship of war be permitted to repair to the ports of which the blockade has been decreed, we therefore, for that purpose, make known the same by the present note to H.E. the Ambassador of Great Britain.

"14 July, 1835."[1]

We have quoted this declaration (which was evidently carefully drawn) at some length, because (1) it includes vessels of war; (2) it expressly interdicts access to vessels without cargo.

But the *cause célèbre* of 1835 was the French blockade of Portendic, in Senegal, which attracted great attention at the time, and for years exercised the diplomatists of France and Britain. The British merchants alleged that it was a sham measure, designed to drive them out of the gum trade preserved to them on the Senegal coast by treaty.[2] The French justification of it was a "little war" with the tribes of the coast: the British replied that the coast was perfectly safe, and that the tribes the French were fighting were inland natives. The French interfered with British vessels carrying on the gum trade in 1834 (on the ground that anchorage constituted a "permanent settlement[3]), but the Minister of Marine (Admiral Rigny) assured Lord Granville at Paris early in that year that there was no intention of instituting a blockade.[4] Nevertheless, on 17 January, 1835, the Governor of Senegal issued a long proclamation,[5] reciting the reservation to Britain of liberty to trade in gum with Portendic, when she ceded Senegal to France in 1783, but alleging—

"que . . . le question commerciale s'efface devant la question politique, de laquelle ressort un droit supérieur à toutes les concessions faites par les traités de paix, le droit de blocus . . ."

and that the trading right was, during hostilities with the Portendic tribes, suspended; and he thereby declared—

"(1) L'espace de la côte de Barbarie à partir de la rivière St. Jean

[1] State Papers, Vol. XXIII, p. 741.
[2] *Ibid.*, pp. 551, 565.
[3] *Ibid.*, p. 565.
[4] *Ibid.*, p. 544.
[5] *Ibid.*, p. 558.

jusques et y compris le baie de Portendic, est mis en état de blocus, à compter du 15 Février prochain, jusqu'à notifications contraires, ce qui aura lieu dans les 2 mois qui suivront la ratification du traité de paix à intervenir. . . .

"(2) Pendant la durée du blocus, nul bâtiment étranger ni français ne pourra trafiquer, vendre ni acheter à Portendic; et sera considéré comme ayant manqué au droit des nations tout navire sous quelque pavillon que ce soit, qui, après les publications et notifications des présentes, serait réconnu avoir fait ou tenté de faire des opérations de commerce, ou jeté sur la côte des armes, munitions ou objets quelconques pouvant profiter aux ennemis du Sénégal. . . .

"Fait à St. Louis, le 17 Janvier, 1835. (Sd.) N. PUJOL."

This is interesting, as showing that individual notification was not thought necessary in this case by France. But its main interest lies in the situation created by the blockade of a territory in which a third power has treaty rights. The occurrence emphasizes the difficulties which arise from such reservations. On the whole, the French Governor's contention appears to be justified, that the reservation cannot hinder the exercise of war rights; at any rate, so long as it is purely contractual, and confers nothing like a "real" right which the third party can forcibly exercise for himself in peace time with or without the leave of the territorial Power.

In reply,[1] the Lieutenant-Governor of Bathurst took the point that the reservation was an absolute one; and the better point, that—

"the line of coast which your Excellency proposes to place in a state of blockade is not the territory of the tribe of Trarza Moors."

Dr. Dodson, K.A., was consulted by the Earl of Aberdeen on these delicate matters. In the course of his reply, dated Doctors' Commons, 23 March, 1835, he said:—

"I am of opinion that the French authorities have no right to prohibit British trade within those limits, under the pretence of a blockade, more especially as . . . the Trarzas, one of the Barbarian tribes, are the only enemies of the French, and that no hostilities exist with the other native tribes inhabiting or frequenting that portion of Africa. Under these circumstances it appears to me that the blockade which has been proclaimed amounts to a deviation from the rules of international law, and is inconsistent with the rights of Great Britain under the treaty of 1783. I must take leave to add that the part of the proclamation which declares that the blockade shall continue in force until two months after the ratification of a treaty of peace is unquestionably contrary to the law of nations."[2]

Lord Palmerston put the British view crudely and vigorously

[1] State Papers, Vol. XXIII, p. 559. [2] *Ibid.*, p. 563.

in a despatch dated 19 May, 1835,[1] when he wrote, quoting the treaty of 1783:—

"It appears, therefore, that the right of the French to Senegal, and the right of the English to a free trade in gum with the places named, are coeval and coequal with each other, and are both derived from one and the same treaty; that the one right cannot be denied without at the same time invalidating the other; and that Great Britain is bound to acknowledge the right of France to the Colony of Senegal, so long as France respects the rights of British subjects to carry on the gum trade within the limits specified in the treaty; but that if France infringes the engagements contained in Article XI, Great Britain is no longer bound to respect those contained in Article IX. . . ."

This contention is plausible, but essentially unsound. Great Britain did not *promise* to respect the French ownership of Senegal; she transferred it. Whether France merely promised to permit the English gum trade, or created some kind of "real" right to its continuance, may be a question. But it is, in no view of the matter, a question of setting off one promise against another.

Lord Palmerston also insisted that the French could not blockade their own port. Distinguishing between belligerent blockades and municipal closing of ports to trade, he says:—

"Portendic was ceded to France in 1783, and H.M. Government are not aware that it has since been wrested from France by conquest. . . . If the French Government, for its own convenience, has thought fit to abandon the fort and to leave the bay unoccupied, it cannot, by such an arrangement, defeat the rights secured to British subjects by the treaty."

The French Foreign Minister agreed to rescind the provision by which the blockade might endure after the conclusion of peace.[2] The Minister of Marine compared the blockade to the British blockade of Sierra Leone in 1826, which (he says) Canning justified on the ground of the existence of hostilities with the coast natives.[3] Lord Palmerston had proposed that the blockade should be restricted to a municipal measure, directed against the import of arms and munitions of war. Admiral Duperré, as a practical man, considered—

"que rien ne serait plus propre à amener des differends et même des collisions graves."[4]

He remarks, with much force, that the commercial rights secured to Britain in 1783, if absolutely paramount, would make it impossible to conduct operations of war or to effect a forcible suppression of insurrection in the territory altogether.

On 17 July instructions were sent to the Governor of Senegal

[1] State Papers, Vol. XXIII, p. 563.
[2] *Ibid.*, p. 569, Granville to Palmerston, 5 June, 1835. *Vide* also p. 573.
[3] *Ibid.*, p. 571, Duperré to de Broglie, 27 May, 1835. [4] *Ibid.*, p. 572.

to discontinue the blockade, and to rely on the right of stopping contraband,[1] and it was raised on 14 August.[2] A joint commission sat in Paris to settle these questions, but it arrived at no satisfactory result.[3]

Brazil blockaded the ports of the province of Parà in 1835, and notified the fact to the foreign ministers at Rio de Janeiro.[4] Special notification by the blockading force was promised.

Venezuela blockaded the fortress of Puerto-Caballo on 10 December, 1835, six days being allowed for exit, and vessels of war being exempted by favour. Exceptionally, for a South American blockade, individual notification was dispensed with, periods from fifteen (Curaçoa) to thirty (Europe) days being allowed—

"to give time for the receipt and knowledge of this decree by all persons whom it may concern.

"During the existence of this blockade, the blockading force will prevent the entrance of all vessels; and if any vessels bring articles of contraband [at any time?], or attempt to enter after the notification of the blockade, or in any way infringe it by coming to the port after the time prescribed . . . they will be detained and judged according to the law and to international law."[5]

Texas blockaded Matamoras as from the date of the proclamation (21 July, 1836), comprising in the blockade the mouth of the Rio Grande and the Brazos Santiago, and also the inlets, passes, and estuaries east of it—

"that now *and hereafter* may be in the possession of Mexico."

Periods of from five to forty-five days were allowed, after which the decree was to "take effect," whatever was precisely meant by that.

In 1837 Mexico blockaded all the ports, harbours, and roadsteads on the coast of Texas, from long. 94° 50′ to 101° 10′ W.[6]

On 1 June, 1838, Count Molé addressed a letter to Earl Granville, intimating a French blockade of Mexican ports (as from 16 April, in the case of Vera Cruz), and stating that mail ships of Great Britain would be unaffected by it. This exemption was stated to be motived by the Postal Convention of 14 June, 1833, Article XIII of which authorized the continuance of postal relations between the two countries even in time of war.[7] The French Minister in Mexico issued regulations providing for—

(1) Special notification.
(2) Allowance of fifteen days for exit with or without cargo.
(3) Vera Cruz and Tampico to be open for mails.
(4) All ports to be open for Mexican fishing-boats.

[1] State Papers, Vol. XXIII, p. 585.
[2] *Ibid.*, p. 587.
[3] *Ibid.*, Vol. XXIII, p. 543; XXVII, p. 1228; XXX, p. 581.
[4] *Ibid.*, Vol. XXIV, p. 540.
[5] *Ibid.*, p. 977.
[6] *Ibid.*, Vol. XXV, p. 597.
[7] *Ibid.*, Vol. XXVI, pp. 725, 1099.

On 20 June, 1838, Count Molé sent another letter to Lord Granville, intimating a blockade of Argentina.

"Le Commandant des forces navales françaises dans la mer du Sud, conformément aux instructions éventuelles qu'il avait reçues, a déclaré, le 28me Mars dernier, en état de blocus le port de Buenos Ayres et tout le littoral appartenant à la république Argentine. Ce blocus, immédiatement notifié par lui aux Agens des puissances étrangères à Buenos Ayres, est devenu effectif dès le même jour, 28me Mars. . . ."

Mail packets were here again exempted. Vessels had up to 10 May for exit, i.e. about six weeks.[1] The blockade was formally notified to the *Argentine* Foreign Minister by the French Admiral.[2] The Argentine Government responded that a naval officer committed a grave irregularity in involving his Government in proceedings which amounted to war.[3]

"Jusqu'à présent la France n'a pas déclaré la guerre à la republique argentine. Les hostilités que votre excellence lui impose de fait sans aucune sommation préalable, sont contraires non seulement aux régles de la justice, mais elles décèlent aussi une conduite peu digne d'une nation magnanime et généreuse. . . ."

Neutral ministers were also warned, and told—

"qu'il sera pris contre les bâtimens qui chercheraient à entrer dans les ports bloqués, après avoir reçu la signification du blocus par l'un des bâtimens de guerre français, les mesures de rigueur autorisés pas les lois des nations."[4]

Correspondence still went on between the Admiral and the Argentine Government. The French Consul, in a letter of 27 September, 1838, which can hardly be described as less than insulting, presented an ultimatum to the Dictator Rosas, threatening a speedy French conquest of the Republic.[5] The Argentines proposed arbitration; it was refused,[6] and France captured an Argentine island.[7] Clearly, if this was not war, it was very like it.

Peru-Bolivia blockaded Valparaiso from 18 August, 1838, by decree of 17 February.[8] Chili retorted with a blockade, decreed 2 April, to commence from the 18th, of Callao, Chorillos, and Ancon.

In 1839 Captain Smith, H.M.S. "Volage," gave notice, in consequence of apprehended danger to British subjects, of his intention to blockade Canton.[9] Egress was promised to vessels actually in the port, or arriving within six days (which latter were

[1] State Papers, Vol. XXVI, pp. 727, 728.
[2] *Ibid.*, p. 959.
[3] *Ibid.*, p. 961.
[4] *Ibid.*, p. 972.
[5] *Ibid.*, p. 1020.
[6] *Ibid.*, p. 1023.
[7] *Ibid.*, p. 1024.
[8] *Ibid.*, p. 1054.
[9] *Ibid.*, Vol. XXIX., p. 1069 (11 Sept).

presumably to be permitted to enter). Five days later, notice was given that the blockade would not be established. Its inartistic form raises doubts as to the propriety of entrusting subordinate naval officers with power to establish blockades.

Admiral Bremer, however, blockaded Canton on 22 June, 1840, as from the 28th,[1] and this was shortly notified in London on 17 November.

Carthagena (Colombia) was blockaded in 1841. Two proclamations were issued, varying slightly, by the Governor of the State of Manzanares and the Commander-in-Chief. The latter (dated 14 July) established certain delays (ranging from twenty to eighty days) "to enter the port without molestation with whatever merchandise they bring; and further, foreign vessels will be allowed to enter the port, after the expiration of the above term, after being registered by the chiefs of the blockading squadron, not finding on board provisions or elements of war which would tend to retard the surrender of the city; but, if the reverse, such vessels will be compelled to retire from the port; but should they persist in forcing an entrance, they will be sunk by the blockading squadron."[2]

Spain again found it necessary to blockade the coast "from Castro-Urdiales to Fuenterrabia exclusive of those two ports and those of Guetaria, S. Sebastian, and Pasages" of Cantabria on 17 October, 1841. On this occasion a proclamation was issued enjoining individual notification.[3]

"4. Every neutral vessel which may be met with within the assigned limits carrying ammunition or materials of war is hereby declared a lawful prize.

"5. Should such neutral vessel be met with beyond the limits, the declaration of blockade of the said coast will be noted down in the muster-roll, log-book, or register of the cargo, and on the said vessel being found afterwards, and with such note, within the limits, she will be a lawful prize, although her cargo may contain no materials of war.

"6. The coast . . . having been declared to be in a state of blockade, it is a consequence thereof that fishing within its limits should be prohibited, the fishing-boats and nets seized, and the fishermen detained. . . .

"9. All vessels will be captured which may be found under the circumstances pointed out in the Privateers' Regulations of 1801, and within the limits generally assigned by all nations according to the principles of maritime law, viz. a distance of three miles; this distance is to be understood as commencing from the line drawn from point to point of the creeks, gulfs, and bays of the said coast, . . . it must, however, be borne in mind that the situation of the blockaded coast is such that only the vessels

[1] State Papers, Vol. XXXIV, p. 1260.
[2] *Ibid.*, Vol. XXX, p. 514.
[3] *Ibid.*, p. 1375.

going into its harbours must navigate close to it, and that the act of any other vessel doing so, which is bound for another destination, must be considered as suspicious, unless caused by extraordinary circumstances."

This proclamation should be read in connexion with that of 1814, on which it throws some light. It would almost seem as if the protests against the exercise of municipal authority on the high seas in the earlier case had led Spain, in the later one, to go to the opposite extreme and to limit the operations of a regular blockade to territorial waters.

The usual explanatory decree was issued on 19 October, allowing exit and reiterating the necessity of individual warning in very categorical language.[1]

Barcelona was blockaded on 26 November, 1842,[2] the adjacent coast from the river Besos to the Llobregat (inclusive) being comprehended in the limits of the measure. Similar regulations were issued. Alicante and Carthagena were blockaded on 5 February, 1844.[3]

In 1842 Texas again affected to blockade (26 March)—

"all the ports of the Republic of Mexico on the eastern coast, from Tabasco in the State of Tabasco to Matamoras in the State of Tamaulipas, including those ports and comprising the mouth of the Rio Grande del Norte, and the Brazos Santiago, and all the inlets, estuaries, and passes on the said eastern coast of Mexico."[4]

Delays of five to forty-five days were given before the blockade should take effect, but individual notice was not promised. The blockade was declared null by the British Government, information being received from the Minister in Mexico stating that by 10 and 16 June, 1842, no vessels had appeared before Tampico and Vera Cruz respectively; and, indeed, that no Texan vessels had been sighted off the coast down to the middle of July.[5] It seems, therefore, that a blockade announced to commence on a given date may validly be postponed, at any rate by the British theory, but that it must not be postponed too long.

In 1842 (17 June) the British Admiral in North America blockaded S. Juan de Nicaragua by a proclamation, almost unique in British practice, as establishing a system of individual notification.[6]

"I hereby declare the port of S. Juan de Nicaragua, situated at the mouth of the river of the same name, to be blockaded, and that all *commercial*[7] intercourse with the said port shall be prevented and cease....

"I hereby give public notice of the same to all whom it may concern;

[1] State Papers, Vol. XXX, p. 1377.
[2] *Ibid.*, Vol. XXXI, p. 1060.
[3] *Ibid.*, Vol. XXXIII, p. 817.
[4] *Ibid.*, Vol. XXXIV, p. 1261.
[5] *Ibid.*, p. 1262.
[6] *Ibid.*, p. 1263. Cf. p. 156 *infra*.
[7] Italics ours.

and that all ships and vessels, under whatever flag they may be, will be turned away and prevented from entering the said port . . . and if, after any ship or vessel has been warned not to enter the said port, then and in that case, any such ship or vessel that may attempt to break the blockade will be seized and be dealt with according to the rules established for the breach of a *de facto* blockade."

The blockade was intimated on 8 December, 1843, by the Admiral to have been raised;[1] but it was again in existence between 30 March, 1844, and 2 October, 1844.

On 24 November, 1842, the British Minister in Mexico was informed[2] that the Mexican Government intended to blockade Sisal and Campeche and such parts of the coast of Yucatan as were in revolt (except Laguna de Terminos). What the precise effect of an ambulatory expression of a future intention is may be questioned. It creates a situation much on a par with that which occurs when a blockade notified to commence on a fixed day does not then actually take effect.

Internal disorders in Peru led to a blockade of Arica (17 June, 1843), and a further blockade of Iquique, the latter by one vessel (4 July, confirmed by the supreme Government 18 July).[3] The latter blockade was raised by formal notice, and the blockade of Arica reimposed (both having been interrupted) on 12 September. That of Iquique was reimposed 1 December. But there seem to have been further *de facto* suspensions, followed by complaints by neutrals; and on 29 February, 1844, both blockades were reimposed. All the proclamations are in the most succinct terms.

Mogador, in Morocco, was blockaded by France in 1844.[4] The French Commander notified it to the captain of H.M.S. "Warspite," and the fact was published in London in due course.

In 1845 occurred the British-French blockades of Argentina, in which were included the coasts of Uruguay occupied by Argentine troops. A blockade of Buceo was instituted on 1 August, up to the 12th being allowed for exit, by the Admirals Inglefield and de Lainé.[5] It was notified on 31 October in London; and at the same time it was intimated, with less precision, that all the other ports of Uruguay occupied by the Argentine troops had been blockaded. This can scarcely be defended. A belligerent cannot throw on neutrals the onus of finding out the political situation in foreign countries.

A somewhat rhetorical dispatch[6] to the Argentine Government, signed by the British and French Ministers, incidentally informs

[1] State Papers, Vol. XXXIV., p. 1264.
[2] *Ibid.*, p. 1263.
[3] *Ibid.*, Vol. XXXIII, p. 809 *et seq.*
[4] *Ibid.*, Vol. XXXIV, p. 1265.
[5] *Ibid.*, p. 1265.
[6] *Ibid.*, p. 1271.

us that the allies had gone so far as to seize the Argentine fleet. It wound up by intimating a blockade of Buenos Ayres within forty-eight hours of the delivery of a declaration to that effect, (made on 23 September).[1] Fifteen days were allowed for exit (extendible).

On 19 August, 1846, the United States naval commander declared—

"all the ports, harbours, bays, outlets [*sic*], and inlets on the west coast of Mexico, south of S. Diego, to be in a state of vigorous blockade, which will be made absolute except against armed vessels of neutral nations. All neutral merchant vessels," it proceeded, ". . . will be allowed twenty days to leave."[2]

In 1846, therefore, the United States still adhered to the principle of admitting warships.

The naval commanders on the east coast had, on 20 May, intimated by letters to the commander of H.M.S. "Rose,"[3] and to the British Consul at Tampico, blockades respectively of Vera Cruz and of Tampico. Vessels then in port were given until 5 June for exit, and the blockade was (like the French one)[4] not enforced as against non-commercial mail packets and fishing vessels.

On 15 April, 1846, the Captain-General of Galicia announced a blockade of the Galician coast, limited, in the way which we have given reasons for considering illegitimate, to dangerous cargoes. But—

"Article II. The blockade of the coast in general is to be understood as more strictly circumscribed to the port of Vigo and its river, and the entry of any vessels whatsoever into these places is severely prohibited. . . .

"Article III. The English steamers shall touch only at this port of Corunna for the purpose for which they are established by their Government. . . . Merchant and coasting vessels will be allowed to put into any other ports of the coast, taking previous information, if possible, that they are not occupied by insurgents."[5]

Of course, no such duty of inquiry can be thrown on neutrals. They are entitled to definite information from the belligerent what ports are blockaded or in hostile hands. And the partial interdiction of access to Corunna, from which port the proclamation was actually dated, is another instance of the confusion in the Spanish mind of the right of blockade with the right of municipal regulation of navigation.

Portugal blockaded the Douro in the same year (20 October),

[1] State Papers, Vol. XXXIV, p. 1272.
[2] *Ibid.*, p. 1139.
[3] Cf. the Mogador blockade, *supra*, p. 151.
[4] *Supra*, p. 147.
[5] State Papers, Vol. XXXV, p. 860.

notification being made in London on 16 November.[1] The blockade was raised on 1 July, 1847.[2]

"Positive instructions had been given . . . to allow British ships of war to enter the port unmolested, and not to prevent the delivery and receipt there of the mails conveying the correspondence, or the landing of passengers, or even the departure of British subjects who may wish to embark on the packets."

In 1848, Denmark blockaded the North German ports by Royal proclamation.[3]

"COPENHAGUE, *le* 29 *Avril*, 1848.

"Nous, Frédéric VII, par le grace de Dieu Roi de Danemark etc. savoir faisons:—Par suite des hostilités survenues entre nous et entre leurs Majestés les rois de Prusse et de Hanovre, leurs Alt. RR. les G. Ducs d'Oldenbourg et de Mecklenbourg, et les villes libres anséatiques de Lubeck, Hambourg et Brême, nous nous sommes vu dans la nécessité de déclarer en état de blocus les ports, le littoral et les embouchures des fleuves de ces états ainsi que ceux des ports de nos propres états qui sont occupés par les troupes de ces souverains et de ces villes libres. Nous avons ordonné à nos vaisseaux de guerre de mettre à exécution le dite mésure et de ne permettre ni à nos propres navires ni à ceux des puissances alliées amies et neutres d'entrer dans les ports et les endroits bloqués par nos vaisseaux de guerre.

"(Sd.) FRÉDÉRIC R."

On 7 March, 1849, the Danish Minister of State notified to the diplomatic body a blockade as from the 27th, of all the ports of Schleswig and Holstein (except Als and Aeroe Islands and places actually under the royal government). The indefiniteness of the previous proclamation made some such specification necessary, as it is hardly enough to say, "we will blockade all blockadeable ports."

Indeed, the royal proclamation never seems to have been closely carried out. It purported to affect all the enemy's ports; yet on 3 April, 1849, we find the Danish Foreign Minister intimating a blockade of the German ports of Cammin, Swinemunde, Wolgast, Greifswalde, Stralsund and Rostock (to commence on the 5th), Pillau and Danzig (to commence on the 12th), and the Elbe, Weser, and Jahde (to commence the same day).[4]

The blockade of the above towns was raised on or before 5 August; that of the Elbe, Weser, and Jahde on the 11th; that of the west coast of Holstein and the coast of Schleswig on the 11th.[5] That of East Holstein was raised later in the month.[6]

Turkey blockaded Samos in 1849, notifying in Constantinople,

[1] State Papers, Vol. XXXV, p. 862.
[2] *Ibid.*, p. 1153.
[3] *Ibid.*, Vol. XL, p. 1298.
[4] *Ibid.*, Vol. XXXVII, p. 282.
[5] *Ibid.*, p. 284.
[6] *Ibid.*, pp. 284, 286.

on 14 October, that the blockade would begin to operate in fourteen days.[1]

Venezuela chose the coast of Coro for its 1849 blockade. A careful proclamation, contrasting strongly with the summary notices issued by Austria, Denmark, and Turkey, was issued.[2]

(1) The coast of Coro, from the river Yaracny to the river Oribono, to be in a state of blockade: this to be enforced by four armed vessels, subsequently augmented in number.

(2) Friendly and neutral ships to have free access to the port of Vela de Coro.

(3) Delays of from eight to sixty days, according to destination; during which time the blockading squadron simply warns ships and marks their papers. "Only in the event of attempting after this notification to enter . . . shall the vessel be liable to detention and condemnation."[3]

On 22 March, 1849, the Neapolitan Government intimated in Naples its intention to blockade the port and gulf of Palermo from 1 April. Simultaneously it set a watch on the Sicilian coasts, to prevent the importation of arms and ammunition.[4] The blockade was raised in June, and was notified by letter from the Neapolitan to the French commander at Palermo.[5]

The Austrian Foreign Minister intimated at Vienna on 31 March, 1849, a blockade of Venice, to commence on 4 April; and on 7 June, it intimated that Ancona had been blockaded. No periods of delay were expressly fixed in any of these blockades of 1849.[6] Ancona was in the Papal States, with which Austria was really, if not ostensibly, at war. The notification to Great Britain here ran:—

"VIENNA, 7 *June*, 1849.

"The undersigned, etc., has the honour to inform Mr. Magenis, etc., that the port of Ancona has been placed under effective blockade by the vessels of war of H.I. and R.A. Majesty, and that, considering the hostile operations directed against this town from the land, this blockade must be looked upon as a regular siege. As this blockade has only for its object to contribute towards the re-establishment of the legitimate authority within the territories of the Church, it follows that it will be raised as soon as that object shall have been attained."

The blockade of Venice was raised on 27 August, 1849.[7]

On 19 March, 1849, it was notified in London that Sir C. Hotham, commodore on the West African station, had announced that war had been declared against the Gallinas and an effective blockade established from Solyman Point to Cazee.[8]

[1] State Papers, Vol. XXXVII, p. 287.
[2] *Ibid.*, p. 284.
[3] *Ibid.*, p. 284. Presumably *after* the lapse of time no notice would be necessary
[4] *Ibid.*, p. 281.
[5] *Ibid.*, p. 283.
[6] *Ibid.*, p. 282–3.
[7] *Ibid.*, p. 286.
[8] *Ibid.*, p. 552.

In 1850, Denmark closed the navigation of the Eider,[1] reopening it on 30 January, 1851.

"MR. DE REEDTZ to SIR HENRY WYNN, 3 *Oct.*, 1850.

"M. Le Chevalier,—With reference to the official note which I had the honour to address to you on the 21st inst., I have to inform you that owing to information which I have received, the commander-in-chief of the Danish forces has been obliged to make use of the authority given to him to prohibit the navigation of the Eider. In order to afford, as far as possible, every facility to the navigation of friendly and neutral Powers, the Government of the King, my august master, has in the meantime hastened to allow neutral merchant ships, coming from the Baltic, to leave that river until the 10th October inclusive. . . .

"(Sd.) REEDTZ."[2]

A French blockade of the West African Coast from the River Grand Bassam to the River Assinée was instituted on 24 November, 1849. It was relaxed by the French commodore, and the relaxation notified to the British naval officer.[3]

Turkey again blockaded Samos in 1851. Notification of the intention to institute the blockade in twenty days was given in Constantinople on 18 January, and on 23 April the blockade was raised.[4] In the same year the British naval forces blockaded the coast of Salvador; for how long is uncertain.[5]

A blockade of Montenegro was established in 1852 by Turkey. In announcing its removal, the Ottoman Porte sent a memorandum to the Foreign Missions as follows, on 10 April, 1853:—

"Votre Excellence sait que pour réprimer la révolte des habitans de Montenégro, qui fait partie de l'empire Ottoman, révolte qui a éclaté dernièrement, le blocus avait été établi sur les côtes d'Antivari. Comme . . . la tranquillité à été rétablie à Montenégro Sa Hautesse a ordonné la levée du blocus, ce qui a été porté à la connaissance des autorités de la S. Porte là-bas . . . ."[6]

In the same year (1853) the Argentine Confederation instituted from April to June a blockade of Buenos Ayres. This measure was communicated by the Argentine commodore to the British Admiral on the station:[7] Buenos Ayres being stated to be in the power of the insurgents.

France communicated through the embassy in London notice of a blockade from 20 September, 1852, of the coast from the left bank of the Grande Lahou to the right bank of the Assinée (West Coast of Africa).[8]

In 1852 also occurred a blockade of "all ports and places

[1] State Papers, Vol. XXXVIII, p. 598.
[2] *Ibid.*, Vol. XXXVIII, p. 598.
[3] *Ibid.*, Vol. XL, p. 857.
[4] *Ibid.*, Vol. XL, pp. 857–8.
[5] *Ibid.*, p. 858.
[6] *Ibid.*, Vol. XLII, p. 237.
[7] *Ibid.*, pp. 238, 239.
[8] *Ibid.*, p. 240.

in the Bight of Benin (except Badagry) from long. 1° to 4° 30 E. of Greenwich," which was established on 1 January, and raised on 11 February (Whydah, 15 June). These measures were taken by naval officers (on the instructions of the Government), and duly notified on 12 January and 17 April by the Foreign Office.[1] The causes which led to the blockade are detailed in a letter from Commander Bruce (6 December, 1851). The gallant Commander did not know the exact limits of the coast subject to the authority of the chiefs of Dahomey and Lagos, whom he proposed to coerce; but, hearing that the slave trade existed between the limits above-mentioned, he blockaded the whole.[2] Vessels of war were not interfered with; a special notification was to be given to all ships, and the remarkable instructions were given to the fleet that vessels were not to be searched which belonged to a nation that had not conceded that right to Great Britain.[3] What, under such circumstances, was the use of declaring a blockade it is hard to see.

A blockade of the Russian ports in the Black Sea was instituted by Admiral Lyons on 1 February, 1855. But the fact was not communicated to the Government until 11 February, and was not notified in the "Gazette" until 3 March. It extended to—

"the mouth of the River Dniester, the ports of Akerman, Ovidiopol, Odessa, all the ports situated between Ochakov Point and Kinburn Point, including the ports of Nicolaev and Kherson, the rivers Boug and Dnieper: also the ports between Kinburn Point and Cape Tarkan, including the ports in the Gulf of Perekop, the port of Sevastopol, the ports comprised between Cape Aia and the Straits of Kertch, including those of Yalta, Aloushta, Soudak, Kaffa or Theodosia."

This somewhat confusing list was complicated by a statement that—

"the port of Kertch, the Straits of Kertch, the entrance to and all the ports in the Sea of Azov, including especially [*sic*] the ports of Berdianok, Taganrog and Arabat: the River Don, and also the ports of Anape and Sonjak were strictly blockaded by a competent force of the allied fleets of France and England."

It further was declared—

"that the ports of Eupatoria, Straltzka, Kamiesh, Kazatch and Balaklava were, and are, and will remain, open and free from all blockade until further notice."[4]

A blockade of the Danube, instituted on 1 June, 1854, was raised on 18 February, 1855.[5]

[1] State Papers, XLI, pp. 662–4.
[2] *Ibid.*, p. 229.
[3] *Ibid.*, p. 230.
[4] *Ibid.*, XLV, p. 583.
[5] *Ibid.*, XLIV, p. 894, and XLV, p. 584.

On 27 April, 1855, the "Gazette" notified a Baltic blockade as follows:—

"FOREIGN OFFICE, 27 *April*, 1855.

"It is hereby notified that H.M.'s Government has received information from Captain Watson, R.N., commanding a squadron of H.M.'s ships in the Baltic, dated 'H.M.S. "Imperieuse," off Libau, 19 April, 1855,' to the effect that on and from the 17th April, 1855, and in the name of H.M. and of Her Ally, H.M. Napoleon III, Emperor of the French, the Russian port of Libau, on the coast of Courland, was placed in a state of strict blockade by a competent force of H.M.'s ships and vessels; and that on and from the 19th April, 1855, all Russian ports, roads, havens, and creeks, from lat. 55° 54′ N., long. 21° 5′ E. to the Filsand Lighthouse in lat. 58° 25′ N., long. 21° 50′ E. (including especially the ports of Sackenbaun, Windau, and the entrance to the Gulf of Riga) were also placed in a state of strict blockade by a competent force. . . ."[1]

The Baltic and Finnish blockade was extended 12 July, 1855, by a joint proclamation notified in London 27 July. It ran:—

"It is hereby notified, in the name of H.B.M. Queen Victoria, and H.I.M. Napoleon III, Emperor of the French, that on the 12th July inst., all Russian ports, roads, havens and creeks in the Gulf of Bothnia, from Tornea in lat. 65° 46′ N. long. 24° 7′ E. to Nystad in lat. 60° 46′ N. long. 21° 20′ E., including especially the ports of Uleaborg, Brahestad, Gamla Carleby, Nyâ Carleby, Wasa, Christinestad, Biörneborg and Raumo, were placed in a state of strict blockade by a competent force of the allied fleets. And it is hereby further notified, with reference to the blockade of the coast of Finland between Nystad and Hango Head, and of the islands and islets fronting the said coast, established on the 15th ult., that on the 14th July inst., all other Russian islands facing the coast of Finland, and all Russian islands in the Gulf of Bothnia, including especially the Aland Islands, were placed in a state of strict blockade by a competent force, etc. . . ."[2]

A similar blockade had been in existence from 28 May, 1852, to 21 October, 1854.[3]

In May, 1855, the Gulf of Finland was blockaded by Admiral Dundas, and notification made as follows:—

"It is hereby notified that on the 28th April last, the entrance to the Gulf of Finland from Hango Head, in lat. 59° 46′ N., long, 22° 58′ E. to the Dagerort Lighthouse, in lat. 58° 55′ N., long. 22° 12′ E.—and that all Russian ports, roads, havens and creeks from the Dagerort to the Filsand Lighthouse, in lat. 58° 25′ N., long 21° 25′ E., were placed in a state of strict blockade by a competent force of H.M. ships. . . . Given on board H.M.S. 'Duke of Wellington,' etc, this 3 May, 1855.[4] (Sd.) R. S. DUNDAS."

A further notification was made (28 May, 1855) that on the preceding day all the ports, creeks, and inlets in the Gulf of

[1] State Papers, Vol. XLV, p. 585.
[2] *Ibid.*, p. 589.
[3] *Ibid.*, XLIV, pp. 894, 899.
[4] *Ibid.*, XLV, p. 585.

Finland (including especially the port of Cronstadt) were strictly blockaded by a competent force.[1]

The blockade was again extended (15 June) to—

"all Russian ports, roads, havens, and creeks on the coast of Finland from Nystad in lat. 60° 46′ N., long. 21° 20′ E. to Hango Head in lat. 59° 46′ N., long. 22° 55′ E., including especially the port of Abo, and including likewise all the islands and islets fronting the south coast, and all channels and passages leading amongst the south islands towards the south coast [specifying several in particular]."[2]

The previous blockade of the Gulf of Finland in 1854 had been established by Sir C. Napier in a document which shows a tendency towards the practice adopted by France in 1870 and 1896 to enclose areas of sea within the limits of blockade. After enumerating the ports in the Gulf from Helsingfors to Cape Lubovki, it proceeds:—

"From Cape Lubovki the line of blockade crosses to Tolboukin Light, immediately off Cronstadt, then across southward to off the town of Borki in lat. 59° 57 N., long. 29° 28′ E."

And again:—

"From Borki to Karevalda Island, thence to Dolgoi Ness, and from Dolgoi Ness to Kolgenpia Point, which includes Bight of Koporia, from thence to Kourgoulo Point, which includes Louga Bay, then the River Narva and the whole coast of Esthonia, etc."[3]

This method, as will have been seen, was not repeated in 1855. Nor was it applied in 1854 to the case of the other Baltic ports.[4] The manner in which the Baltic blockade was carried out in 1854, appears from a letter of Captain A. Cooper Key.[5] Two ships (sometimes one) watched the three mile deep-water channel at the entrance to the Gulf of Riga, and two others patrolled the coast between Windan and Memel. 154 vessels "on the slightest reasonable doubt" of want of knowledge were warned off between 20 April and 14 June. The officer adds that only four vessels were detained for attempting to enter the blockaded ports, two of which had cargoes of coal.

The White Sea ports proclamation ran (1855):—

"It is hereby notified that on and after the 11th June, 1855, all the Russian ports, roads, havens, and creeks in the White Sea from Port Orlofka in lat. 67° 11′ 30″ N., long. 41° 22′ 12″ E., to Cape Kanoushin in lat. 67° 11′ 33″ N., long. 43° 48′ 42″ E., including especially the ports of Archangel and Onega, are placed in a state of strict blockade, etc. Dated . . . 11 June, 1855. "(Sd.) THOMAS BAILLIE."[6]

[1] State Papers, XLIV, p. 586.
[2] *Ibid.*, Vol. XLV, p. 587.
[3] *Ibid.*, Vol. XLIV, p. 895.
[4] *Ibid.*, p. 896.
[5] *Ibid.*, p. 898.
[6] *Ibid.*, Vol. XLV, p. 588.

This blockade was raised on 9 October, by Captain Baillie (notified in London 29 November, 1855).[1] On 8 April, 1856, it was notified that orders had been given for the raising of all the Russian blockades.[2] A similar blockade to the last took place in 1854.[3]

During the Russian war, certain States forbade, under more or less definite penalties, blockade-running and contraband dealing.

Hamburg[4] threatened with fine and imprisonment those who exported from that city—

"whether under Hamburg or foreign colours, or by land [to a belligerent], ammunition, guns, gunpowder, saltpetre, sulphur, balls, caps, all kinds of arms, and generally speaking all objects which may be used in warfare."

The Senate also declared that the captains of ships under Hamburg colours were not permitted to break blockades—but it specified no penalty. Stringent declarations as to the security to be given that articles such as are above mentioned will reach their due neutral destination, were exacted by a proclamation of 22 May, 1854.[5]

Lubeck[6] prohibited the export of contraband "for the belligerent Powers or their subjects," under penalty of confiscation and further animadversion. Contraband is clumsily defined as—

"arms, ordnance, firearms, and munitions of war of every description, but particularly gunpowder, musket and cannon balls, rockets, percussion-caps, and all other articles serving for war purposes, as also saltpetre, sulphur, and lead."

The Senate of the same city ordered that no master of a Lubeck vessel should break a blockade, or, after having being informed thereof, endeavour clandestinely to evade it.[7]

Bremen prohibited the export of contraband—

"and particularly of munitions of war, gunpowder, musket and cannon balls, percussion-caps, sulphur and saltpetre, ordnance, and arms of every description, and generally of all articles immediately serving for purposes of war"—

to the territory of any of the belligerent Powers (it does not mention their fleet or army) by land or water, and whether under Bremen or foreign flag. Confiscation, fine, and imprisonment were threatened. But Bremen did not think it necessary to prohibit blockade-running.[8]

[1] State Papers, Vol. XLV, p. 590.
[2] *Ibid.*, Vol. XLVI, p. 542.
[3] *Ibid.*, Vol. XLIV, p. 898.
[4] *Ibid.*, Vol. XLV, p. 1269.
[5] *Ibid.*, p. 1270.
[6] *Ibid.*, p. 1271.
[7] *Ibid.*, p. 1272.
[8] *Ibid.*, p. 1273.

The Emperor of Hayti (18 November, 1854)[1] forbade ships under the Haytian flag to carry contraband or to run blockades, but the proclamation contained no definite penalties for its infringement.

George V of Hanover proclaimed a law under which contraband trading was penalised by confiscation, 500 dols. fine, or six months' imprisonment. The same penalty was imposed on the carriage of troops, despatches, or couriers for the belligerents. The mention of "couriers" is interesting in view of the Mason and Slidell case. It applied to Hanoverian ships, and to export under any flag from Hanoverian territory. Such export might be stopped *manu militari*.[2]

The Chinese operations of 1857–8 produced a blockade by the allied forces of Canton (raised 10 February, 1858). It was notified thus in England in the "Gazette," 13 October, 1857.[3]

"FOREIGN OFFICE, 13 *October*, 1857.

"It is hereby notified that the Rt. Hon. the Earl of Clarendon, H.M.'s Principal Secretary of State for foreign affairs, has received from the Lords Commissioners of the Admiralty a despatch from Rear-Admiral Sir Michael Seymour, K.C.B., concerning H.M's. naval forces in China, dated from on board H.M.S. the 'Calcutta' Aug. 8, 1857, stating that he had on that day established a blockade of the port and river of Canton by a competent force under his command. And it is hereby further notified that all the measures authorized by the laws of nations and treaties will be adopted and executed with respect to all vessels which may attempt to violate the said blockade."[4]

In 1856 what constituted a legal blockade was set forth in the Declaration of Paris signed by the plenipotentiaries of England, Austria, France, Prussia, Russia, Sardinia, and Turkey, the fourth article of which was as follows:—

"Les blocus pour être obligatoires doivent être effectifs, c'est à dire, maintenus par une force suffisante pour interdire réelement l'acces du littoral de l'ennemi."[5]

France and Spain in conjunction blocked certain ports in Cochin-China in 1858. A proclamation, as under, was signed, 1 September, by the French Admiral, and notified in the "Moniteur," and to the diplomatic body in Paris, on 7 December.

"I the undersigned, commanding in chief the French and Spanish forces charged with obtaining from the Emperor of Cochin-China the redress for grievances which is due to the Governments of France and Spain, and in virtue of the powers which belong to me as commander

[1] State Papers, Vol. XLV, p. 1274.
[2] *Ibid*, p. 1275.
[3] *Ibid.*, Vol. XLVIII, p. 960.
[4] *Ibid.*, Vol. XLVII, p. 560.
[5] Samwer, "Recueil," Vol. II, first series, p. 768.

in chief, declare: Commencing from the 1st of September 1858, the bay and river of Touranne and the port of Chamcallao are held in a state of effective blockade by the naval and military forces placed under my command. Proceedings will be taken against every vessel which shall attempt to violate the blockade, in conformity with international law, and with the treaties in force with neutral Powers.

"(Signed) C. RIGAULT DE GENOUILLY."[1]

Peru declared a "pacific" blockade in October 1858.[2] President Castilla, reciting the offences of Ecuador and the refusal of satisfaction by the latter Power, culminating in the breaking off of communication with the Peruvian Minister, and remarking on the want of success which had attended Peru's own lenity and pacific policy, declared that as it was repugnant to the fraternal sentiments of the Peruvian Government to afflict the Ecuadorians with the calamities of a war, it was proper to employ coercive measures which would do no immediate injury to the Ecuadorian people. The decree was as follows:—

"(1) All the ports, bays, creeks, and landing-places of Ecuador situated within the line of coast comprised between 1° 50′ N. lat. and 3° 30′ S. lat., and the islands included therein, shall be blockaded by a sufficient force of the Peruvian navy.[3] From the time that the blockade is made effective, the commanders of the blockading ships will adopt all the measures authorized by international law against all who may attempt to violate it.

"(2) The blockade of the said ports, bays, creeks, and landing-places shall remain in force, before employing *other*[4] hostile measures, for such time as, according to the judgment of the Government of Peru, may be sufficient to estimate the effect of this coercive measure in regard to the Ecuadorian Government.

"(3) The blockade shall be notified to friendly Powers in the regular way . . . 26 Oct. 1858."

A war between Spain and Morocco led to a blockade in 1859 of the ports of the latter by the former Power. It was instituted on 28 October, 1859, and raised on 25 March, 1860. Notification was made in the official gazette, and communicated to the diplomatic body at Madrid.[5]

In the same year (1859) France blockaded Venice. The blockade was notified in the "Moniteur Officiel" of 2 June, and notification was sent to the foreign representatives the same day.

"Il est notifié par les présentes que son excellence le Ministre de la Marine a été informé par le Contre-Amiral Jurien de la Gravierè, commandant les forces navales françaises dans l'Adriatique, que le 18 Mai,

[1] State Papers, XLVIII, p. 961. [2] *Ibid.*, XLIX, p. 1320.

[3] Peru then filled the place on the Pacific seaboard in respect of naval force which is now occupied by Chili.

[4] Italics ours. The pacific character of the blockade may be clearly estimated from this unlucky word. [5] State Papers, L, p. 634; XLIX, p. 933.

1859, et à partir du dit jour, il a été établi par les forces navales placées sous son commandement un blocus effectif du port de Venise et de ses issues. Il est en outre notifié par les présents que toutes les mesures autorisées par le droit des gens et les traités respectifs existant entre S.M. l'Empereur et les differentes puissances neutres seront adoptées et exécutées par rapport à tous les navires qui tentaient de violer le dit blocus."[1]

Ancona having been blockaded in 1860,[2] Gaëta was blockaded by Sardinia in 1861. The Sardinian Minister in London on 4 February wrote to Lord John Russell notifying that it had been blockaded from 20 January. The blockade ended on 13 February with the capitulation of the fortress. The citadel (but not the town) of Messina was blockaded on 5 March.[3]

Turkey blockaded the Albanian coast. Dilever Bey, the naval commander, established the blockade on 13 April, 1861, and it was notified in London by the Ottoman Ambassador on the 18th.[4]

In 1861[5] declarations of blockade of the Confederate ports were declared by the President of the United States. The first measure taken was to declare the Southern harbours to be closed to commerce; but Great Britain energetically protested against its being assumed that such an act carried any right to exercise the powers of a belligerent blockade.

"It is impossible," wrote Lord J. Russell,[6] "for Her Majesty's Government to admit that the President or Congress of the United States can at one and the same time exercise the belligerent rights of blockade and the municipal right of closing the ports of the South. . . . An assumed right to close any ports in the hands of insurgents would imply a right to stop vessels on the high seas without instituting an effective blockade. This would be a manifest evasion of the necessity of blockade in order to close an enemy's port. Neutral vessels would be excluded where no force exists in the neighbourhood of the port sufficient to carry that exclusion into effect. Maritime nations would not submit to this excess under pretence of the rights of sovereignty. . . . Her Majesty's Government would consider a decree closing the ports of the South actually in the possession of the insurgent or Confederate States as null and void, and they would not submit to measures taken on the high seas in pursuance of such decree."

Further, when an Act of Congress authorized the President to take the necessary steps for closing ports and to forfeit ships which should approach them,[7] Lord John observed that[8] the exercise of such powers would be considered as a violation of the unquestionable rights of neutral nations. Mr. Seward gave Lord Lyons to understand (12 August, 1861) that the question was dropped for

[1] State Papers, XLIX, p. 932.
[2] *Ibid.*, L, p. 634.
[3] *Ibid.*, LI, pp. 527–9.
[4] *Ibid.*, p. 529.
[5] *Ibid.*, Vol. LII, pp. 185–269.
[6] Russell to Lyons, 19 July, 1861; State Papers, LI, p. 205.
[7] *Ibid.*, p. 213.
[8] *Ibid.*, p. 218.

the moment, but "influential persons were anxious to moot it again." The French Minister in Washington took up the same position as Lord Lyons.[1] The proclamation, when it appeared, declared all commercial intercourse between the Confederacy and the citizens of "other States and other parts of the United States" unlawful, and goods and merchandise coming therefrom to other parts of the United States, or proceeding thereto (without restriction as to the port of export), forfeitable.[2] The British Foreign Secretary did not think this needed international notice, presumably thinking that it was not meant to be enforced on the high seas.[3] The United States blockade of the Southern States and all their ports was then proclaimed by the President and communicated to the diplomatic body at Washington. Two proclamations were issued, one on 19 April, affecting all the far southern maritime States (including Alabama), and the other on the 28th as to Virginia and North Carolina.[4] These were regarded by Great Britain as proclamations of intention only, requiring to be supplemented by the fact.

Lord Lyons "referred Mr. Seward to the notifications of blockades made by Great Britain during the late war with Russia, and pointed out to him the care and precision with which every particular was stated in them." He asked whether it was intended to issue similar notices for each Southern port as soon as the actual blockade of it should commence. Mr. Seward, however, was sensible of the advantages of adherence to ancient precedent and a less elaborate exposition of intention. It was determined, he said,[5] to notify vessels individually and endorse their papers.

Armed vessels were allowed to enter and leave the blockaded ports,[6] and fifteen days were allowed by the Admiralty for neutral vessels to leave.[7]

The actual blockade was not coincident with the Presidential proclamation. For instance, the blockade of Charleston was enforced by the United States ship of war "Niagara" on 11 May, 1861, and Mr. Seward admitted that that blockade did not begin until then.[8] The "Niagara" left on 15 May, and although Mr. Seward declared that she was relieved in a day or two, the British Consul at Charleston believed that it was a fortnight before the "Minnesota" arrived for that purpose.[9] So, at Savannah the blockading steamer left three days after arrival, and for a fortnight after had not been seen or heard of, leaving the entrance entirely unobstructed.[10]

[1] State Papers, Vol. LI, p. 232.
[2] *Ibid.*, p. 234.
[3] *Ibid.*, p. 238.
[4] *Ibid.*, LV, p. 658.
[5] *Ibid.*, p. 659; Lyons to Russell, 2 May, 1861.
[6] *Ibid.*, p. 664.
[7] *Ibid.*, pp. 666–8.
[8] *Ibid.*, p. 673; Seward to Lyons, 27 May, 1861.
[9] *Ibid.*, p. 680.
[10] *Ibid.*, pp. 674 *et seq.*, 685.

On July 25 the Consul at Charleston wrote that generally only one vessel had been stationed off that port, and that at the moment of writing there had been none there during over twenty-four hours. He gave it as his opinion that the blockade was only effective against large vessels, and that the coasting trade went on as usual,[1] fifty-one vessels having arrived.

Mr. Bunch, however (the Consul in question), makes some statements which cast a little doubt on the inferences drawn by him. In one letter[2] he directs attention to the fact that a privateer entered port in the very face of the blockading ships. But surely this is evidence that the blockading ships were there. On the other hand, the Consul at Wilmington, while noting the continued presence of two vessels, does not think (writing in August)[3] that they are particularly effective in interrupting trade. But Lord Russell did not think that the mere fact that they were frequently evaded made the number of ships inadequate, so long as they constituted an evident danger.[4] Commander Ross examined the Gulf ports on behalf of the British Admiral, and did not think the arrangements adequate.[5]

On 5 February, 1863, Mr. Seward wrote that: ". . . opinions may be entertained by merchants interested in the trade of the port of Galveston in Texas that the blockade of that port . . . may in consequence of recent events in that quarter have been interrupted," and accordingly he reiterates the resumption of the blockade.[6]

During the course of the blockade of the Confederate States some interesting correspondence passed between the Confederate and British Governments as to what, according to the rules of international law, constitutes an effective blockade, and Lord Russell thus stated in a despatch of 10 February, 1863, to Mr. Mason, the views of his Government thereon :—[7]

"It appears to Her Majesty's Government to be sufficiently clear that the Declaration of Paris could not be intended to mean that a port must be so blockaded as really to prevent access in all winds and independently of whether the communication might be carried on in a dark night or by means of small low steamers or coasting craft creeping along the shore; in short, that it was necessary that communication with a port under blockade should be utterly and absolutely impossible under any circumstances.

"In further illustration of this remark, I may say there is no doubt that a blockade would be in legal existence, although a sudden storm or change of wind occasionally blew off the blockading squadron. This is a change to which in the nature of things every blockade is liable. Such an accident does not suspend, much less break a blockade. Whereas, on the

[1] State Papers, Vol. LV, p. 690.
[2] *Ibid.*, p. 697.
[3] *Ibid.*, p. 699.
[4] *Ibid.*, p. 703; Russell to Lyons, 15 February, 1862.
[5] *Ibid.*, p. 703.
[6] *Ibid.*, Vol. LIII, p. 349; Seward to Lyons.
[7] *Ibid.*, Vol. LV, p. 737.

contrary, the driving off a blockading force by a superior force does break a blockade, which must be renewed *de novo* in the usual form to be binding upon neutrals.

"The Declaration of Paris was, in truth, directed against what were once termed 'paper blockades'—that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as the occasional appearance of a man-of-war in the offing.

* * * * * * *

"It is proper to add that the same view of the meaning and effect of the article of the Declaration of Paris on the subject of blockades which is above explained was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two Governments some years before the present war, with a view to the accession of the United States to that declaration."

The Greek Government instituted a blockade of part of its territory (in insurrection) in 1862. It was notified by the Greek Chargé d'Affaires to the British Foreign Office on 9 March. The proclamation ran (in translation):—

"ADMIRALTY, ATHENS, *February* 14/26, 1862.

"It is notified by these presents that, on and from the 13/25th of this present month of February all the coasts of the Gulf of Argolis from the roadstead of Astros (not included) to the Bay of Vourlia (included) have been placed in a state of strict blockade by a sufficient force of the Royal Navy. It is further notified that all measures authorized by the law of nations and the several treaties between His Majesty the King of Greece and the different friendly Powers, will be adopted and carried into execution in regard to all ships which shall attempt to violate the said blockade.

"(Signed) D. BOTZARIS," etc.

The blockade was raised by a proclamation, notified in London in a similar way on 6 May:—

"ADMIRALTY, ATHENS, *April* 10/22, 1862.

"It is notified by these presents that the blockade placed in virtue of our notification of the 14/26 February, 1862, on the coasts of the Gulf of Argolis, between the roadstead of Astros (not included) and the Bay of Vourlia (included) has been raised from the 10/22nd of this month.

"(Signed) A. A. MIAOULIS," etc.[1]

In the same way, Sicily was blockaded by Italy, owing to insurrection. The diplomatic notification (23 August, 1862) seems to have enclosed no proclamation specifying the date at which the blockade commenced. It merely stated that Sicily and the adjacent islands had been declared blockaded. On 1 September word was received that the blockade had been raised.[2]

[1] State Papers, Vol. LII, p. 485.
[2] *Ibid.*, p. 488.

Venezuela this year declared a blockade of the ports and coasts of Maracaybo. The proclamation[1] is interesting :—

"1. The ports and coasts of Maracaybo are to be closed; i.e. all the line which runs from Cape San Roman, in the peninsula of Paraguana, to Point Espada, in the Goajira peninsula.

"2. The said ports and coasts are also declared in a state of blockade.

"3. The blockade will be effective sixty days after date with regard to vessels arriving from Europe; thirty days for those despatched from Demerara and the other West India islands, excepting the vessels from St. Thomas, St. Croix, Curazoa and its dependencies, for which the time will be eight days.

"4. If before the expiration of such terms a vessel shall arrive, whatever be its nationality, to the ports and places blockaded, the blockading forces will notify the existence of the blockade, noting in its log-book the day and place or the latitude in which such vessel was met, and also the notification made. In case the vessel should persist in the pretension to enter, notwithstanding the notification, it will be subject to detention and confiscation.

"5. All communication with the places to which the blockade is extended being prohibited, the force in charge thereof will only allow the sailing of such foreign vessels as have entered before the blockade was established.

"6. The commanders of the blockading force will proceed against the vessels which they detain in consequence of violation of the blockade in the manner provided by the Order on Privateering of 30 March, 1822 . . ."[2]

The French blockaded Tampico and D'Alverado in May, 1862. This was effected by Admiral Jurien on the spot, and was notified diplomatically.[3] Mazatlan, on the West Coast of Mexico, was blockaded by the frigate "Bayonnaise" on 28 May, and this does not seem to have been notified diplomatically at all.[4]

A remarkable feature of the blockade of Tampico was that it was relaxed in favour of vessels carrying neither contraband nor passengers.[5]

France again blockaded Mexican ports in 1863. The notification appears to have been simply handed by the Admiral to the Consuls at Vera Cruz :—[6]

"Nous, etc. vu l'état de guerre existant entre la France et le gouvernement de Juarez . . . déclarons qu'à partir du 6 Sept. courant, les ports et leurs issues, les rivières, havres, rades, criques, etc. des côtes du Mexique qui ne sont point occupés par nos troupes, et qui reconnaissent encore le pouvoir de Juarez, depuis la lagune à 10 lieues au S. de Metamoras, jusqu'à et y compris Campêche, entre 25° 22′ N., 90° 54′ W., et 19° 52′ N., 92° 50′ W. (m. de Paris), seront tenus en état de blocus effectif, par les forces navales placées sous notre commandement, et que les bâtiments

[1] State Papers, Vol. LII, p. 489.
[2] *Ibid.*, Vol. XII, p. 647.
[3] *Ibid.*, Vol. LII, p. 487.
[4] *Ibid.*, p. 488.
[5] *Ibid.*, p. 491.
[6] *Ibid.*, Vol. LIII, p. 350.

amis ou neutres auront un délai de 25 jours pour achever leur chargement et quitter les lieux bloqués.

"(Les points à excepter du blocus sont Tampico, Vera Cruz, Alvarado, Goatzacoalcos, Tabasco et Carmen).

"Il sera procédé contre tout bâtiment qui tenterait de violer le dit blocus conformément aux lois internationales et aux traités en vigueur avec les Puissances neutres.

"À bord la frégate mixte la 'Bellone' etc. le 5 Sept. 1863.

"(Signed) A. BOSSE."

1864 is an *annus mirabilis* for blockades :—

Brazil blockaded the Uruguayan ports of Paysandu and Salto. A note, dated 26 Oct., 1864, from Admiral Tamandare to H.B.M.'s representative at Montevideo conveyed the intelligence :—

"I find myself in the case of notifying to your Excellency, that I am going to order the blockade of the ports of the Oriental Republic of the Uruguay—Salto and Paysandú. This blockade will be rigorously observed as long as there exist the motives which determined the Brazilian Government to take the attitude in which it finds itself from the denial of justice to its claims, and in consequence the naval forces under my orders will not permit that any vessel shall enter these ports, notifying to those that may present themselves the existence and efficacy of the blockade, and those that may attempt to violate it being subject to what the principles of the law of nations establish.

"To those that are at present in the said ports, free exit will be allowed up till the 15th of next November.

"I avail, etc.,

"(Signed) BARON DE TAMANDARE, Vice-Admiral, etc."[1]

In the Austro-Danish war of 1864, in the course of which occurred various interesting passages, such as the shelter of an Austrian squadron in Heligoland waters after an encounter with the Danes, the latter Power blockaded the east coast of Schleswig-Holstein, except so far as under Danish authority. The notification to Great Britain was addressed by the minister in London to Earl Russell, and also by the Danish Admiralty to the British Minister at Copenhagen. These documents ran :—

"26 *February*, 1864.

"MY LORD,—I am directed by my government to inform your Excellency that according to an official notice, issued on the 18th inst. by the Danish Ministry of Marine, all ports and inlets on the East Coast of the Duchies of Schleswig and Holstein will be blockaded from the 25th of this month, with the exception of Neustadt, the Islands of Als and Aeroe, and such other places as are actually under the authority of H.M. the King. The blockade will successively be raised for every place that comes again into the power of the Royal Government, and public notice thereof be given.

"I have, etc.,

"(Signed) TORBEN BILLE."

[1] State Papers, Vol. LIV, p. 544.

"COPENHAGUE, *le* 20 *Février*, 1864.

"MONSIEUR,—J'ai l'honneur de porter à votre connaissance qu'à partir du 25 de ce mois tous les ports, et toutes les embouchures de la côte orientale des duchés de Schleswig et de Holstein se trouveront en état de blocus, à l'exception de Neustadt [&c.]. En vous transmettant sous ce pli quelques exemplaires de la publication par laquelle le Ministère de Marine notifie le blocus, je me permets d'avoir recours à votre bienveillante entremise en vous priant de vouloir bien en donner avis aux agents Consulaires de votre gouvernement résidant dans les places bloquées, en leur notifiant en même temps que tous les bâtiments neutres qui au commencement du blocus se trouvent dans un port bloquée, jouiront jusqu'au 1 Avril de la faculté d'en sortir, soit avec cargaison soit en lest. Si, par suite de circonstances particulières, le delai fixé pour la libre sortie n'est pas trouvé suffisant dans un cas donné, l'officier chargé du blocus est autorisée à se concerter avec l'Agent Consulaire sur un terme plus ample lorsque celui-ci s'addressera à cet effet au sus-dit chef. Agréez, &c.

"(Signed) G. QUAADE."[1]

On 8 March, 1864, the Danish Foreign Office again wrote to the British Minister informing him that from the 15th, the ports of Cammin, Swinemünde, Wolgast, Greifswalde, Stralsund, and Barth would be blockaded. Two months later, these blockades were raised. Pillau and Danzig, which on 19 April were blockaded also,[2] were declared unblockaded at the same time,[3] in compliance with an armistice. On 23 May, Count Bille informed Lord Russell that it was intended to re-establish the blockade of 12 June, unless a prior accommodation was arrived at. No such accommodation supervening, the Danish Admiralty notified[4] that preparations were being made for the blockade of Pillau, Danzig, Colberg, Cammin, Swinemünde, Wolgast, Griefswalde, Stralsund, and Barth, and the east coast of Schleswig-Holstein. These blockades were actually reimposed on the 27th and 26th, and the fact notified by the Danish Government to the diplomatic body;[5] and by the naval commanders to the Consuls at the blockaded ports.[6] Ships were allowed to leave up to 16 July: but the blockade was finally raised on the 20th.

The Danish Regulations contemplate individual warning to a vessel as a normal measure (paragraph 3); but it is not necessary if on account of lapse of time or otherwise it may be inferred that she knew of the blockade.[7]

France extended the blockade of Mexico: including Acapulco and Manzanilla on the west coast (29 February, 1864) and the rivers Goatzocoalcos and Tabasco on the extreme south-east (17

[1] State Papers, Vol. LIV, p. 534 *et seq.*
[2] *Ibid.*, p. 846.
[3] *Ibid.*, p. 540.
[4] *Ibid.*, p. 541.
[5] *Ibid.*, p. 848.
[6] *Ibid.*, 849.
[7] See Danish Prize Regulations, State Papers, Vol. LIV, p. 545.

March).[1] In the prior case the extension seems, at any rate in the first instance, to have been simply notified by a letter from the French Admiral to other naval commanders in the Pacific, and in the latter by a naval proclamation in Mexico. Maximilian being seated on the throne, the blockade was raised by his imperial decree on 29 July.[2]

Spain blockaded all the coasts of the Spanish portion of San Domingo, then in insurrection, by a proclamation of the Governor, dated from San Domingo, one of the blockaded places—a palpable absurdity, and a sort of anticipation of what took place in Crete thirty years later.[3] The proclamation ran :—

"S. DOMINGO, 5 *October*, 1863.

"Don Felipe Ribero y Lemoyne, etc.: Various provinces of the Spanish part of this island having declared themselves in rebellion against Her Catholic Majesty . . . and in the necessity of adopting the corresponding measures to prevent the revolutionists from receiving assistance by the coasts—using the powers, etc., I order and command—

"Art. I. All the coasts of the island[4] and its littoral waters are declared under blockade by the naval forces of Her Majesty, and in consequence every vessel may be required to show their papers and documents and be scrupulously examined. Those that come laden with people, whatever may be their destination or the place whence they come, are at once suspicious; but if their papers and manifest do not confirm the suspicion, they shall only be obliged to go away; in the opposite case, where there are marked flaws in the papers, in the case of bringing cargoes of arms and ammunition or effects which may in any manner contribute to foment the rebellion, they shall be considered as enemies and treated as such according to the ordinances of the Royal Navy."

The proclamation was superseded by one issued by a new governor on 7 November.

Reciting that "some doubts had arisen respecting the execution and understanding of the proclamation," he orders that "the blockade of the coasts of the Spanish part of the island of S. Domingo only extends to the ports, roads, and creeks which are not occupied by the troops of the army, and, in consequence, the ports of Santo Domingo, Samana, and Porto Plata are free . . ."[5]

The British Minister was assured that this blockade was maintained by twenty-three vessels.

Venezuela in this year (1864) declared a blockade of the mouth of the Orinoco (13 September).[6]

[1] State Papers, Vol. LIV, pp. 538, 539.
[2] *Ibid.*, p. 542.
[3] *Ibid.*, p. 536 *et seq.*
[4] He presumably means "the Spanish portion of the island."
[5] *Ibid.*, p. 537. Cf. the British Gold Coast Proclamation and revised edition, *infra*, p. 173.
[6] *Ibid.*, p. 543.

The example shown by Britain and France in affecting to blockade the Argentine in time of peace was imitated in 1864 by the Brazilian Government.[1] Diplomatic relations having been broken off with Uruguay, Brazil carried out her intention of exercising reprisals by the much wider measure than can properly be covered by that term of instituting a blockade of Salto and Paysandu. It was announced in a note to the British Ministers at Montevideo and Buenos Ayres from the Brazilian Admiral Tamandare. The former complained of the absence of any date of commencement of the blockade, and of the impropriety of interference with third parties whilst no war existed;[2] and Earl Russell declared that mere reprisals could not affect neutrals, and also that no British vessel should be detained which had not had full and due notice of the existence of the blockade—an approximation to the French doctrine of individual notification. He also made the significant assertion that "the right of interfering with the commerce of a neutral is incident, and incident only, to a state of war."[3] This pacific blockade, as is the natural tendency of such measures, immediately ran out into operations of war and the siege of Paysandu, which fell on 2 January, 1865.

Montevideo itself was blockaded on 2 February, 1865, seven days being allowed for egress.[4] Peace was declared on the 21st.

Brazil and Uruguay having come to terms, war immediately broke out between La Plata and Paraguay, and the ports of the latter Power were blockaded[5] by a decree of the Argentine President. Brazil, already at war with Paraguay, instituted a like blockade (notified, as before, by the Admiral), allowing twenty days for exit, and including in its limits the province of Matto Grosso as occupied by the enemy.[6] During the continuance of this blockade the "Doterel" was permitted to proceed to Asuncion to treat with Lopez for the return of British subjects; but the "Linnet" was not allowed to traverse the line of blockade for the general support of British interests in Paraguay.[7]

The Venezuelan blockade (established 13 September, 1864, by decree notified to foreign legations) of the Orinoco was raised by similar notification on 14 December, 1864.[8]

The Brazilian blockade of Montevideo was raised on the conclusion of peace, 21 February, 1865.[9]

On 24 September, 1865,[10] the Spanish Admiral notified the legations in Chili that the ports of that country were considered in a state of blockade. War ensued with Chili and Peru, and in its

[1] State Papers, Vol. LXVI, pp. 1201 *et seq.*
[2] *Ibid.*, p. 1206.
[3] *Ibid.*, p. 1209.
[4] *Ibid.*, p. 1243.
[5] *Ibid.*, p. 1263.
[6] *Ibid.*, p. 1265.
[7] *Ibid.*, pp. 1300, 1350.
[8] *Ibid.*, Vol. LV, p. 293.
[9] *Ibid.*, p. 295.
[10] *Ibid.*, p. 296; Vol. LVI, p. 741.

course the proclamation was succeeded by others more definite. In the first place, there supervened a blockade of Callao, Valparaiso, and Caldera; notified by the Spanish Admiral to the representatives of foreign Powers in Peru and Chili. In the case of Callao six days were allowed for exit, and the blockades were raised by the summer.[1] The full instructions to the Spanish naval commanders present considerable interest:[2] they recognize the principle "Free ships, free goods" and the inviolability of convoy and fishermen, and declare that "a neutral vessel bound to a blockaded port is not obliged to know that such blockade exists until after it has been notified to her and the notification is written in the muster-roll or in some other document which the ship carries . . ." Similarly full instructions were issued to the commanders of Chilian privateers.[3] Spain not being party to the Declaration of Paris, Chili was at liberty to commission such vessels, having no regular navy.

Details of the manner in which the Valparaiso blockade was carried out are to be found in a report of Commander Blake to the senior officer.[4]

In 1868 Venezuela, by presidential decree dated 9 March, blockaded one of its own States. By Article III of the instrument it is provided:—

"If any vessel should approach any part of the coast aforesaid, the blockading force will notify to it the existence of the blockade, noting down in the ship's papers the day and the place, or the latitude, when and where it was met with, and also the notification made to it. In case of the vessel persisting in the attempt to enter, notwithstanding the information, or if it should return again to the said parts of the coast, it will be subject to be captured and detained for judgment accordingly."[5]

The blockade was raised by decree, 22 May.[6]

The Franco-Prussian war of 1870 was not without its blockades. By a declaration of Admiral Fourichon the coast of Prussia and her allies was blockaded in accordance with its terms, as follows (as translated in Earl Granville's "Gazette" notice):—[7]

"From the 15th of August, 1870, the coast of Prussia and the North German Confederation, extending from the Island of Baltrum to the north of the Eider, with its ports, rivers, havens, roads, and creeks, is kept in a state of effective blockade by the naval forces under our command, and friendly or neutral vessels will be allowed a delay of 10 days to complete their lading and to quit the blockaded ports.

[1] State Papers, Vol. LVI, pp. 646, 647.
[2] *Ibid.*, p. 741.
[3] *Ibid.*, p. 751.
[4] *Ibid.*, p. 755.
[5] *Ibid.*, Vol. LVIII, p. 29.
[6] *Ibid.*, p. 30.
[7] *Ibid.*, Vol. LX, p. 443.

"The geographical limits of the blockade are: the meridian of 5° E. long. of Paris, as far as the parallel of 54° 5′ of N. lat.; the parallel as far as the longitude of 5° 45′ of Paris; thence the meridian of 5° 45′ as far as the parallel of 54° 20′ of latitude; and finally, this last parallel to the coast.

"Every vessel that shall attempt to violate the said blockade shall be proceeded with in conformity with the law of nations and the treaties in force with neutral Powers.—On board the 'Magnanime,' etc., 12 August, 1870. "(Signed) FOURICHON."[1]

This is believed to be the first instance (except perhaps that noticed above as attempted in 1854) of an attempt to indicate a mathematical area as "the limits of the blockade." Whether the meaning is that a ship is safe outside them, or that she can be captured if she is found trying to get inside them, seems to be doubtful. In either case the innovation seems to be devoid of point. The date of commencement was subsequently stated to have been in reality 19 August.[2] The blockade was raised on 22 September, and an official communication to that effect was made by M. Jules Favre.[3] But Rouen, Dieppe, and Fécamp (occupied by the Germans) were blockaded on 13 December.

An interesting arbitral decision on the subject of blockade was given by the President of Chili on a question referred by Britain and Argentina in 1870.[4] It affirmed the principle (*inter alia*) that a term is not necessarily given to neutral vessels within which they may enter a blockaded port. The enunciation of the principles governing a blockade is lucid, and of sufficient importance to set out in full. He finds:—

"(1) That the State which resolves to blockade the port of another with which it is at war has the right to dictate all the measures tending to cause the blockade to be respected by neutrals.

"(2) That it was neither natural nor just to exact from the Argentine Confederation that it should give reception in its ports to vessels that might have violated the blockade, it being on the contrary natural and just that it should refuse to receive them.

"(3) That a term is not given to neutral vessels within which they may enter a blockaded port, neither can it be exacted that it be granted to them in order that they may submit themselves to the measures dictated for the purpose of causing an established blockade to be respected.

"(4) That the nation which in a state of war resolves to close its ports to foreign commerce is the sole judge in determining the conditions under which the entry to them may be permitted, and to decide whether those who claim to enter have complied or not complied with those conditions."

The entire coast of Acheen was blockaded by proclamation of the Governor-General of the Dutch East Indies on 4 June, 1873.[5]

[1] State Papers, Vol. LX, p. 443. [2] *Ibid.*, p. 444.
[3] *Ibid.*, p. 445. [4] *Ibid.*, Vol. LXIII, p. 1173. [5] *Ibid.*, p. 976.

France blockaded its own territory (presumably in insurrection) on the Gold Coast, on 24 April, 1872.

Venezuela blockaded two of its own States by presidential decree in 1871;[1] the blockading force being stated as "1 steamer, 2 schooners, and 4 cutters." This was hardly adequate; nor was any time allowed for departure. The Orinoco mouth was blockaded in the same year,[2] and opened on 4 May, 1872.[3] A fourth State was blockaded in 1874.[4] This blockade was raised on 15 March, 1875.[5] The State was recited in the Venezuelan decree to be in insurrection, and certain specified periods of delay before the blockade came into operation were conceded to vessels coming from distant ports, within which period a special notification was to be given to such vessels attempting to enter blockaded ports. After lapse of the respective periods vessels were to be bound by diplomatic notification.

The Orinoco was again blockaded by Venezuela in 1880.[6]

A blockade of the Gold Coast was established on 29 August, 1873, by a royal proclamation issued by the Administrator at Cape Coast Castle. This amounted to a blockade of our own protected territories, and on the whole seems to be of doubtful legality *qua* blockade. One cannot blockade one's own territory unless it is in hostile effective occupation, and although one can interdict access to the shore, one cannot interfere with vessels on the high seas. Consequently, Captain Fremantle's ensuing denunciation of the penalties authorized by the law of nations and by treaties against vessels attempting to violate the blockade was a little wanting in foundation. It may have been for this reason that a further proclamation was issued on 15 December by the succeeding naval officer (Com. Hewett), in which the blockade was carefully limited to the districts occupied by the enemy and his allies. The blockade was finally raised in April, 1874.[7]

Sulu (said to be Spanish and in insurrection) was blockaded by the Spanish in 1873. Unlike many of these blockades of semi-civilized districts, the Sulu blockade gave rise to several captures, and an interesting correspondence with the British and German Governments ensued.[8] The first measures of exclusion were represented as an exclusion of foreign trade, in practice limited to the exclusion of firearms, etc. But on 15 August, 1873, a German ship, the "Marie Louise," was captured in Sulu waters, and declared good prize for (*inter alia*) breach of a blockade, which was asserted to have commenced *de facto* on 2 August, it

[1] State Papers, LXVI, p. 939.
[2] *Ibid.*, LXVII, p. 520.
[3] *Ibid.*, p. 601.
[4] *Ibid.*, Vol. LXVI, p. 1033.
[5] *Ibid.*, p. 1034.
[6] *Ibid.*, Vol. LXXI, pp. 228, 229.
[7] *Ibid.*, Vol. LXV, p. 1289, *et seq.*
[8] *Ibid.*, Vol. LXXIII, p. 932, *et seq.*

not being thought worth while at the time to notify it.[1] How a blockade could exist which it was not worth while to notify, on the ground that it never occurred to the authorities that any ships were likely to come, is inexplicable. The Spanish Foreign Minister left this question unanswered, and refused to defend the seizure on this ground.

Nor did he regard the individual notification to the ship as sufficient to affect it with notice of a blockade. He therefore relied on the ground of contraband: and treated the use of British colours by the German ship as fraud, which justified condemnation of the latter as prize of war. Lastly, he justified the capture as valid by municipal navigation laws, and effected in territorial waters.[2]

In November, a notification of blockade was published by the Spanish Vice-Consul at Singapore, through the official "Gazette"; this was objected to by Germany as insufficient,[3] but in March, 1875, we find Sir Hugh Low writing from Labuan that "the blockade is being intensified in vigour."[4] H.M.S. "Frolic" was accordingly excluded from Sulu.[5] But in the early part of the same year there seemed some likelihood of an acceptance of the Spanish terms by Sulu: and the blockade was raised *quoad* Spanish ships, which on the principles of the "Franciska,"[6] was sufficient to invalidate it altogether.

Lord Derby, in a despatch to Lord Odo Russell, took occasion to assert that the Spanish Government was not in a position to proclaim a blockade in Sulu so long as she claimed sovereignty over that archipelago.

> "Blockade," he said, "is a belligerent right, and can only be exercised against a State with which the blockading Power is at war. A Power may prohibit foreign trade with its own ports; but such prohibition does not carry with it the same rights of interference with foreign vessels as are conferred by a regularly constituted blockade."—(17 January, 1876.)

This is true: but it overlooks the fact that Spain and Sulu were *de facto* belligerents, and it was extraordinary that Lord Derby should have been advised to put forward such a contention as that a nation cannot blockade its own ports, when twelve years previously the United States had blockaded Charleston, Baltimore, and New Orleans.

On 31 January, 1874, the Spanish Republic declared a blockade of the north coast of Spain against the Carlists (excepting Gijon,

[1] State Papers, Vol. LXXIII, p. 940.
[2] *Ibid.*, Mr. Carvahal to Baron von Canitz, 22 December, 1873.
[3] *Ibid.*, Count Munster to Earl Granville, 13 February, 1874.
[4] *Ibid.*, p. 957. [5] *Ibid.*, p. 958.
[6] Northcote *v.* Douglas, 10 Moo., P.C.C. 37.

Santander and S. Sebastian) as from 20 February. It was, however, never put in force.[1]

The Dahomey coast within certain limits was blockaded by the British Government (by Commodore's declaration) on 3 July, 1876. A previous blockade had been instituted by the Commodore, but postponed by the Government.[2]

A notification dated 28 June, 1877, was subsequently published in the "London Gazette," to the effect that the Admiralty had transmitted to the Foreign Office information received from the senior officer on the station that the blockade had been raised from 12 May, 1877.[3]

The Turkish blockade of the Black Sea in 1877 was notified by the Ambassador at Constantinople to the British Government on 4 May. A delay of three days for entrance and five for clearance was allowed (subsequently extended).[4] The armistice of 1878 involved the raising of the blockade, which was officially notified on 4 February.[5]

In October, 1879, Porto Plata and Monte Christi (in insurrection) were blockaded by San Domingo, lengthy indulgences being accorded.[6]

At the outset of the Chili-Peruvian war of 1879 the Chilians blockaded Iquique,[7] and the fact was notified to Foreign Ministers. The blockade was raised on 5 August.[8] Arica was blockaded (with due notification) on 6 December,[9] Callao on 10 April, 1880.[10]

In the last case the Chilian naval authorities alone gave the notification, communicating with the consular doyen at Callao; and short notice to leave was given (ten days). Ilo and Mollendo were blockaded in a similar manner in the same month.[11]

The years 1883 and 1884 saw several minor blockades, and one (Formosa) of noticeable importance.

Jérémie and Jacmel (in Hayti) were blockaded by presidential decree on 5 June and 24 July. A blockade of Miragoâne, in the same island, had been announced to the British Consul on 3 May,[12] and on 14 December through the same channel it was notified that the blockade of Jacmel had become effective through the arrival of the corvette "Dessalines." This double declaration of blockade and effective blockade suggests possible complications which might be worth consideration. As a matter of fact, Jacmel

[1] State Papers, LXV, p. 642 *et seq.*
[2] *Ibid.*, LXVII, p. 530.
[3] *Ibid.*, LXVIII, p. 82.
[4] *Ibid.*, p. 922.
[5] *Ibid.*, Vol. LXIX, p. 626.
[6] *Ibid.*, Vol. LXX, p. 181.
[7] *Ibid.*, p. 1195.
[8] *Ibid.*, p. 1195.
[9] *Ibid.*, Vol. LXXI, p. 128.
[10] *Ibid.*, p. 374.
[11] *Ibid.*, p. 763.
[12] *Ibid.*, Vol. LXXIV, pp. 762, 763.

was taken very shortly afterwards,[1] and Miragoâne early in 1884,[2] when the insurrection ended.

The capture of the shipwrecked crew (British, Dutch, and other) of the "Nisero" by an Achîn râja (the Râja of Tenom) was the occasion of a blockade of his territories by the Dutch,[3] after a fruitless and devastating land expedition.[4] The actual motive of the Râja's action was to put pressure on the Dutch in order to remove restrictions on his trade.[5]

Earl Granville observed that the blockade would constitute

"an act of war . . . giving other Powers the right to recognize the Achinese as belligerents. To this it was replied," he says, "that the proposed blockade was not intended as a blockade *jure gentium*, but as a municipal act under which the ports would be closed to trade. I pointed out that the closing of ports to foreign trade as a municipal act could only apply to ports in the possession of the Netherlands Government, but that as regards those ports which were in the possession and under the control of the hostile Achinese, the access of neutral vessels thereto could only be lawfully interdicted by an effective blockade *jure gentium*."[6]

In 1884, France blockaded certain ports in Madagascar, by no further formality than the declarations of the Admiral (Micot) to the diplomatic body in the island.[7] She also blockaded the north and west coasts of Formosa. In this case a declaration by the Admiral appeared in the "Journal Officiel," and a copy was sent by the French Foreign Office to the British Ambassador. At the same time the blockade was notified to Lord Granville by the French Ambassador in London. The Admiral's declaration ran thus:—

"Nous, etc., déclarons qu'à partir du 23 Octobre, 1884, tous les ports et rades de l'île Formose compris entre le Cap Sud ou Cap Nansha et la Baie Soo-an, en passant par l'ouest et le nord (ces points placés, le premier par 21° 55′ lat. N. et 118° 30′ long. E. de Paris; le second par 24° 30′ lat. N. et 119° 33′ long. E. de Paris), seront tenus en état de blocus effectif par les forces navales placées sous notre commandement, et que les bâtiments amis auront un delai de 3 jours pour achever leur chargement et quitter les lieux bloqués. Il sera procédé contre tout bâtiment qui tenterait de violer le dit blocus conformément aux lois internationales et aux traités en vigueur. A bord du cuirassé français; 'Bayard,' le 20 Octobre, 1884."

On the institution of the blockade of Formosa, Lord Granville wrote to the French Ambassador that H.B.M.'s Government were limiting their action to the observance of the Foreign Enlistment Act. If the French proposed simply to interdict the access

[1] State Papers, Vol. LXXV, p. 492.
[2] *Ibid.*, p. 493.
[3] *Ibid.*, pp. 493, 1125, 1144, 1151, 1154, *et passim*.
[4] *Ibid.*, p. 1124.
[5] *Ibid.*, p. 1132.
[6] *Ibid.*, p. 1145.
[7] *Ibid.*, pp. 493, 495.

to Formosa of neutral ships by force, he was prepared to let matters remain on that footing. But if they were to be seized and captured, further steps would have to be taken[1] such as the issue of a proclamation of neutrality would entail.[2] This suggestion M. Waddington failed to appreciate. He declared[3] that Britain and France were accustomed to establish blockades in time of peace, and that the sanction of their courts ("juridictions spéciales") had been given to such a proceeding. Earl Granville reiterated his view that France and China were at war, and put the Foreign Enlistment Act in active execution. The blockade was thus legitimated, and affords another instance of the tendency of "pacific" blockades to furnish an avenue to war.

The French blockade of Madagascar gave rise to one or two points of interest. The British vessel "Orénoque" was given notice to leave one of the blockaded ports within five hours; this was protested against by Lord Granville, who stated that the more recent custom was to allow fifteen days for egress.[4]

The Egyptian coast of the Red Sea, within certain limits, was blockaded in the autumn of 1885.[5]

A blockade of Carthagena, in Colombia, was established in February, 1885. It possesses this feature of interest for the student of federal constitutions, that it was established by the State of Bolivar over an insurgent port within its own territory without reference to the central government of Santa Fé da Bogota.

The blockade of Carthagena was declared on 16 February, 1885, and a note to that effect was directed to H.B.M. Consul at Barranquilla by the Bolivar Secretary-General there. It was maintained by a tug-boat of 120 tons with two guns. The whole proceedings seem very confused, because another Colombian State (Panama) had already declared Barranquilla (and the other port at the mouth of the Magdalena, Savanilla) "closed to foreign commerce" on 14 January, and had been seconded by an officer styled the Fiscal Inspector of the Custom Houses of the Atlantic, who, as "the immediate representative of the national executive power," had (from Carthagena) declared Savanilla and Barranquilla closed to foreign commerce and coasting trade, and had declared that duties would be exacted over again from vessels disregarding the prohibition. The outcome of this interesting situation is unfortunately not apparent,[6] but the result of the general conflict seems to have been unfavourable to the Panama authorities.[7]

[1] State Papers, Vol. LXXVI, p. 424.
[2] *Ibid.*, p. 431.
[3] *Ibid.*, p. 425.
[4] *Ibid.*, p. 455.
[5] *Ibid.*, p. 719.
[6] *Ibid.*, pp. 1016–19.
[7] "Annual Register."

In 1886, San Domingo blockaded the district of Monte Christi for two or three months,[1] and the "pacific" blockade of Greece took place. This was a blockade limited to Greek vessels, and so presenting few analogies with a real blockade. It has been justified as a measure of reprisals, but obviously went very much further than the mere seizure of a definite number of ships as security for liquidated damages—which is all that reprisals properly cover.

France was not a party to this blockade, which, as is known, was motived by the nervousness with which the Powers regarded any possible outbreak of war in the Balkans. It was thought at the time that any violent proceedings in that quarter would act as a spark in a powder magazine. We now know that when Greece and Turkey went to war ten years later there was little difficulty in localizing the disturbance. Perhaps it is hard to blame statesmen who were not so clear-sighted as M. de Freycinet, who felt at liberty to declare[2] to Lord Lyons that he was not disposed to send ships to Greek waters . . . that he shrank from running the risk of placing the naval forces of France in a position in which they might be called to fire upon Greek ships, and that he felt sure that anything of this kind would be very repugnant to public feeling in France.

The Gladstone as well as the Salisbury Government is, however, responsible for the adoption of the "blockade" by Great Britain, and Lord Rosebery strongly condemned the politics of Greece in a lengthy justification of the attitude of the British Government. On 7 May, 1886, the Ambassadors left Greece. The curious blockade was then instituted, which included somewhat improperly, in any event, "the entrance to the Gulf of Corinth,"—part of the high seas,—and which was declared to be instituted "against ships under the Greek flag."[3] It was also limited by the specific instructions given to commanders not to interfere with Greek vessels carrying the goods of other Powers under arrangements made prior to the "blockade." How the blockading Powers proposed to justify to other nations (say the North American States or France) the detention of goods belonging to their subjects being on board sequestrated Greek vessels, or damaged by remaining on shore for want of a ship during these sweeping interferences with commerce, is a point regarding which no interest seems to have been shown. The sequestrated vessels were to be restored at the conclusion of the blockade (no liability for compensation being admitted).[4]

The French Chargé d'Affaires informed Lord Salisbury on

[1] State Papers, LXXVII., p. 1029.
[2] *Ibid.*, p. 653.
[3] *Ibid.*, p. 682.
[4] *Ibid.*, p. 690.

9 October, 1887, that the French President at Grand Bassam had established a blockade of the Ebrie coast from Abre to Dabou inclusive.[1] It was raised 13 February, 1888.[2] In a precisely similar way Portugal announced the blockade and reopening of Quissembo. No delays were fixed—probably none were necessary. Various Haytian ports were blockaded by Hayti at the end of October, 1888;[3] this blockade is remarkable for the fact that the British Consul-General in Hayti intimated in the following June that it had plainly ceased to be effective, and would no longer be respected.[4]

The blockade of the Zanzibar coast of East Africa by Britain and Germany is worth a word of notice. Ostensibly established by the assent of the Sultan of Zanzibar, it was directed to the stoppage of the import of arms and the export of slaves,[5] and was apparently justified by the fact that the continental dominions of Zanzibar were in insurrection.[6] However, the Sultan's self-constituted mandatories, Britain and Germany, were in possession of Bagamoyo and other places on the coast, and the blockade seems illegal in so far as it prohibited access generally. The Portuguese were induced to issue a notification of blockade of their Mozambique coast, then in their effective occupation, "as against the importation of arms and the exportation of slaves"—a futile and absolutely illegal pretension[7] if the proclamation meant what it said. Probably it merely meant that the ports would be closed to such traffic under municipal penalties.

His Highness the Sultan of Zanzibar (whose subjects found their commerce with the mainland interdicted) declined to co-operate actively. The "blockade" was notified by the British Consul-General, and a British proclamation by him limited its operation to the traffic in slaves and munitions of war. But no Government can assume to prohibit certain kinds of traffic with its ports under the penalties of blockade-running, and the British and Germans were in this case trying to do exactly what they had blamed the Spaniards for doing in Sulu.[8]

The actual establishment of the blockade—as distinguished from the Sultan's and the Consul's notifications—was by a joint declaration in the name of the Sultan by the British and German Admirals, dated 2 December, 1888.

"In accordance with instructions received from our respective Governments, and in the name of H.H. the Sultan of Zanzibar, we, the Admirals commanding the British and German Squadrons, hereby declare a blockade

[1] State Papers, Vol. LXXVIII, p. 169.
[2] *Ibid.*, Vol. LXIX, p. 234.
[3] *Ibid.*, p. 235.
[4] *Ibid.*, Vol. LXXXI, p. 165.
[5] *Ibid.*, Vol. LXXIX, p. 382.
[6] *Ibid.*, p. 380.
[7] *Ibid.*, p. 385.
[8] *Supra*, p. 174.

against the importation of munitions of war and the exportation of slaves only, on the continuous line of coast of Zanzibar, including the Islands of Mafia and Lamu and the lesser islands adjoining the coast from 10° 28′ S. to 2° 10′ S. lat. The blockade will be in force from noon on the 2nd December, 1888.

"(Signed) E. R. FREMANTLE, British Rear-Admiral,
C.-in-C. East Station.
"DEINHARD, German Rear-Admiral,
Commanding Flying Squadron."

The Consul-General who issued the proclamation was made the judge for deciding cases of prize arising out of its violation.[1] Italy joined the "blockading" Powers in December.[2] By February, Admiral Deinhard was stopping provisions, and the German Government justified his action. They considered it "independent of the blockade," which was a peaceful operation directed against the slave-trade; and that it was a measure called for by the exigencies of war. Thus we have the full cycle—the term "blockade" has become so far wrested from its proper meaning as to be actually treated as inapplicable to the isolation of a besieged place.[3]

This blockade, which was nothing more than an exercise of municipal law from first to last, was raised on 1 October, 1889.[4] The permission of France had actually to be asked for before her dhows could be searched for arms in Zanzibar waters themselves,[5] which shows that the measure partook in no respect of the nature of a blockade.

On 7 April, 1890, a blockade of part of the Slave Coast was instituted by France. It was established by a notice issued by the Commander-in-Chief in the Bay of Benin, and a delay of only three days was allowed.[6] It was notified in London by the French Ambassador, and raised on 28 October. In 1892 it was renewed (15 June) and notified by the Ambassador, being again raised on 19 December.[7]

During the Franco-Siamese difficulty of 1893, Lord Dufferin elicited from M. Develle the information that, should the Eastern Power prove recalcitrant, the French fleet would blockade the Menam.[8] This Lord Dufferin characterized as resembling "riding another man's horse with one's own spurs"—as it would simply damage British and German trade. The blockade was nevertheless imposed, and it can hardly be doubted that in view of the other hostile measures which were taken by the parties, a state of war

[1] State Papers, LXXXI, p. 98.
[2] *Ibid.*, p. 100.
[3] *Ibid.*, p. 119.
[4] *Ibid.*, p. 132.
[5] *Ibid.*, p. 121. (Consul Euan-Smith to Lord Salisbury, 26 February, 1889.)
[6] *Ibid.*, Vol. LXXXII, p. 1071.
[7] *Ibid.*, p. 1072.
[8] *Ibid.*, Vol. LXXXIV, pp. 688, 689.

then existed between them. The blockade was not restricted to Siamese vessels; and not only was the blockaded coast and ports indicated, but the modern innovation was adopted of interdicting access to zones of sea. The proclamations ran as follows:—[1]

"Nous, etc., declarons qu'à partir du 26 Juillet, 1893 [the date of the document] à 9 h. de soir, tous les ports et rades de le côte, et des îles Siamoises compris entre la Pointe Chulaï et la Pointe Lem-kra-bang, en passant par le nord (ces pointes, le premier par 13° 2′ de lat. N. et 97° 43′ de long. E. du méridian de Paris; le second par 13° 5′ de lat. N. and 98° 31′ de long. E. du méridian de Paris), seront tenus en état de blocus effectif pas les forces navales sous nos ordres, et que les bâtiments amis auront un délai de trois jours pour quitter les lieux bloqués. Il sera procédé contre tout bâtiment qui tenterait de violer le dit blocus conformément aux lois internationales et aux traités en vigueur. A bord du croiseur le 'Forfait' etc.

"(Signed) A. RECULOUX."

The above was issued by the commander of the squadron in the Gulf of Siam. Its mention of "amis" shows that hostilities then existed: and it was followed by a proclamation by the Admiral of the Far Eastern fleet.

"Nous, etc., vu l'état de représailles existant entre le France et le Siam . . . déclarons, qu'à partir du 29 Juillet, 1893 [date of the document] le côte et les ports de Siam, compris:—

"Entre la Pointe Chulaï . . . à la pointe Lem-krabang. . . .

"2. Entre la pointe S. de l'île Ko-Samit, lat. 12° 31′ N., long. 99° 6′ E. et la pointe Lem-Ling, lat. 12° 11′ N., long. 99° 58′ E.,

"seront tenus en état de blocus effectif par les forces navales placées sous notre commandement, et que les bâtiments amis ou neutres auront un delai de trois jours pour achever leur chargement et quitter les lieux bloqués.

"Les limites du blocus s'étendront,—

"1. Pour la première zone bloquée jusqu'à une ligne joignant la pointe Chulaï (ci-dessus designée) à la pointe Lem-kra-bang (ci-dessus designée).

"2. Pour la deuxième zone bloquée jusqu'à une ligne joignant la pointe de l'île Ko-Samit (ci-dessus designée) à la pointe Lem-Ling (ci-dessus designée).

"Il sera procédé etc. À bord de la 'Triomphante' etc.

"(Signed) HUMANN."

There is a manifest contradiction in styling the proceedings reprisals, and at the same time talking about "*amis*" and "*neutres*." Besides, "a state of reprisals" is an expression unknown to International Law. States are either at war, or at peace: and when at peace, one or other or both may commit reprisals, which is a different matter. The word was probably introduced as an equivalent for the phrase "war" employed in

[1] State Papers, LXXXVII, p. 351.

the common form, and designed to be less alarming than "war," and less ridiculous than "peace."

The blockade was raised in two or three days by a proclamation which it is unnecessary to quote. Before its institution (on 27 July), Lord Dufferin intimated to the Prime Minister that it would be put in force on the 31st.[1] Whether or not the fact had been officially intimated does not appear. The news caused Lord Rosebery the greatest surprise, especially as the British Minister at Bangkok telegraphed on the 27th that the blockade had already been established; and he at once instructed Lord Dufferin to ask for explanations. Later he intimated,[2] that if the blockade affected neutral vessels, it must constitute a state of belligerency. French vessels must therefore be restricted in their visits to Singapore, where the "Pepin" was daily expected. The French Government maintained that the discrepancy in dates (between the 31st and 26th) was due to a telegraphic error: unfortunately, a British vessel was stopped and excluded on the 27th or 28th. Eventually she was permitted to enter and discharge, clearing on the 30th. The French Admiral notified the British senior officer that the blockade applied to warships, and the latter instructed the "Linnet" to leave Bangkok. Lord Rosebery, however, telegraphed that the "Linnet" "must on no account leave under the present circumstances."[3]

M. Develle cited, in a despatch of 3 August, 1893, the stock cases on the subject, beginning in 1827. It seems difficult to say why France refused to admit that she was at war with Siam —except for the very pressing, but inadmissible, reason that belligerency entails responsibility. On 13 July, her gunboats "Inconstant" and "Comète" had passed the Menam bar under a heavy fire from the forts at the mouth of the river.[4] On the 14th, 17th, and 19th, there had been fighting on the frontier, when 300 had been killed.[5] It is absurd to say that fighting, a blockade, and a territorial occupation can go on while States are at peace. If the French Government wished to disavow the passage of the Menam bar, the institution of a blockade was a most unfortunate method of exhibiting their pacific intentions.

The apparent attempt to extend the area of the blockade by purporting to define its limits has been imitated on more than one occasion. A line drawn from Point Chulaï on the west to Cape Lem-kra-bang on the east of the Gulf of Siam, encloses a space of some sixty miles each way, which is not the territory of Siam except at the coast-line. How it can be asserted to be possible to blockade such an area is beyond comprehension; for it would

[1] State Papers, LXXXVII, p. 276 *et seq.* [2] *Ibid.*, p. 282.
[3] *Ibid.*, p. 287. [4] *Ibid.*, p. 302. [5] *Ibid.*, p. 320.

involve the exclusion of neutrals from the common highway of nations. Certainly no neutral vessel, except a yacht or surveying ship, would be very likely to go so far up the Gulf, unless she were going to Bangkok; but that is entirely irrelevant to the question of principle.

A similar assertion was made at the time of the Cretan blockade instituted in 1897.[1]

The establishment of a blockade of Crete may have been legal or not. The assertion of a considerable area of the Mediterranean as "the limits of the blockade" was bad beyond argument. This was, perhaps, the most anomalous blockade known to science. The territorial Power (which was Turkey) was not injured: the blockade was established for her benefit. It was, in fact, a kind of partial blockade of Greece, designed to prevent Greek intercourse with Crete. Nothing is better settled than that a blockade which is good against some Powers only, is utterly bad:[2] consequently, the Cretan blockade was bad *ab initio*, and a mere exercise of *force majeure*. For it was put forward as being absolute as against Greek ships, and qualified as against "neutrals," whose vessels were liable to supervision and to interdiction from commerce with the interior.

The limits within which the Admirals affected to circumscribe their sphere of interference were the parallels of 34° 45′ and 35° 48′ N. and the meridians of 23° 24′ and 26° 30′ E., i.e. about twenty miles E. and W. of Crete, and considerably more N. and S.

Notice was given in the "London Gazette" (13 December, 1898) of the raising of this so-called blockade;[3] but there is no information as to any captures in pursuance of it. Hostilities supervened between the Greek kingdom and Turkey; and in its turn, Greece proclaimed a blockade of Epirus and parts of the littoral of the Gulfs of Salonica and Volo. This was done by an official communication from Mr. Metaxas to the Marquis of Salisbury, dated 26 April (8 May), 1897.[4]

"J'ai l'honneur de porter à la connaissance de votre excellence qu'à partir du 26 April (8 Mai) à six heures du matin les côtes de l'Epire et une partie du littoral du golfe de Salonique sont mises en état de blocus effectif. Les limites géographiques de ce blocus sont fixées ainsi qu'il suit. Au golfe de Salonique le blocus s'etendra de la rivière du Pénée entre 39° 54′ lat. N. et 23° 44′ long. E. jusqu'à le rivière de Halicmon entre 40° 29′ 30″ lat. N. et 22° 3′[5] long. E. Le littoral bloqué serait d'une distance de 5 milles marins de le côte. Sur les côtes l'Epire, le blocus s'étendre de Prévesa entre 38° 50′ lat. N. et 20° 44′ 30″ long. E. jusque et y compris Hagii Seranta (Santi Quaranta) entre 39° 50′ 4″ lat. N. et 20° 8′ long. E. de la côte. Le blocus s'étendra jusqu'à la portée d'un canon. Les détroits

[1] State Papers, Vol. LXXXIX, p. 446.
[2] The "Franciska" Northcote *v.* Douglas, 11 Moo. P. C. C. 37.
[3] *Ibid.*, Vol. XCI, p. 113. [4] *Ibid.*, Vol. LXXXIX, p. 443. [5] 33′ (?).

formés par l'Ile de Corfu n'y sont compris et seront laissés libres à la navigation. Les navires que traverseront ces détroits seront visités par les vaisseaux de la Marine Royale qu'auront pour mission de maintenir le blocus."

And three days later:—

"Faisant suite à ma note du 8 de ce mois, j'ai l'honneur, d'ordre de mon Gouvernement, de porter à la connaissance de votre Excellence que le blocus effectif des côtes de l'Epire a été étendu jusque et y compris Valona entre 40° 22′ 6″ lat. N. et 19° 10′ long. E."

And again ($\frac{1}{18}$ May, 1897):—

"J'ai l'honneur de porter à la connaissance de votre Excellence que j'ai été chargé par mon gouvernement de communiquer au gouvernement de S.M.B. que le Golfe de Volo a été déclaré en blocus effectif."

Here the proposal is more modest: though many will demur to the extension of the territorial waters blockaded to anything further than the recognized limit of three nautical miles. The treatment of the entire Gulf of Volo as a Turkish harbour is legitimate enough. It was entirely enclosed by Turkish territory, and has a mouth only four geographical miles wide. Meanwhile, the Powers (except Austria and Germany) were continuing to "blockade" part of the territory of one belligerent as against the other!—a decided interference with the rights of belligerency, though less evidently improper than the German plan of blockading Greece. The threat of the latter measure had such an exasperating effect that it is assigned as a main cause of the outbreak of war between Greece and Turkey.[1]

The United States blockades of 1898 were announced by proclamations, in which the old form was adhered to, specifying the ports blockaded, and refraining from blockading sea-water. A period of thirty days was allowed for exit.[2]

Both parties agreed that blockades, to be binding, must be effective; Spain in more specific terms.[3]

The following notifications with regard to blockades during the Russo-Japanese War appeared in the "London Gazette":—

"*May* 28, 1904.

"H.M's. Principal Secretary of State for Foreign Affairs has received a notification to the following effect from the Japanese Minister in London:—

"'By command of the Imperial Japanese Government, Admiral Togo has declared that on the 26th inst. the entire coast of the Liao-Tung Peninsula lying south of a straight line drawn between Pitsuwo and Pulantien was effectively blockaded by the Imperial naval forces, and that the blockade will continue to be maintained in an effective state.'"

[1] State Papers, Vol. XCI, p. 219 (Egerton to Salisbury).
[2] *Ibid.*, Vol. XC, pp. 1035, 1038, 1039. [3] *Ibid.*, pp. 159, 381.

Individual warning and time for exit do not appear to have been given.

"*January* 5, 1905.

"H.M's. Principal Secretary of State for Foreign Affairs has received the following telegram from H.M's. Minister at Tokio, dated January 2, 1905:—

"'The blockade of the Liao-Tung Peninsula is modified by Proclamation from January 1 as follows:—

"'A line south of the line from Wedge Road on the north-west to South Entry Cape on the south-east. For the present no vessels except Government transports are allowed to enter Dalny Bay without special permission.'"

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1862.	The "Hiawatha"	2 Black, 635	. Notification.
1864.	The "Circassian"	2 Wall., 135	. Capture of blockaded port.
1864.	The "Andromeda"	2 Wall., 481	. Procedure.
1864.	The "Baigorry"	2 Wall., 474	. Effectiveness of blockade.
1865.	The "Admiral"	3 Wall., 603	. Notification of blockade.
1865.	The "Josephine	3 Wall., 83	. Inquiry at blockaded port.
1865.	The "Cornelius"	3 Wall., 214	. Presumption of intent.
1865.	The "Cheshire"	3 Wall., 231	. Inquiry at blockaded port.
1866.	The "Dashing Wave"	5 Wall., 170	. Rules as to navigation when one bank of river is blockaded.
1866.	The "Teresita"	5 Wall., 181	. Accidental drifting of ship into blockaded area.
1866.	The "Sir Wm. Peel"	5 Wall., 517	. Neutral port in proximity to blockaded port. Duty of neutral ships.
1866.	The "Pearl"	5 Wall., 574	. Inferences of fact from evidence.
1867.	The "Flying Scud"	6 Wall., 263	. Prior breach of blockade no ground for condemnation.
1867.	The "Adela"	6 Wall., 267	. Evidence.
1867.	The "Sea Witch"	6 Wall., 242	. Evidence.
1867.	The "Wren"	6 Wall., 582	. Evidence.
1868.	The "Diana"	7 Wall., 254	. Evidence.

1872.	Geipel *v.* Smith . .	L.R., 7 Q.B., 404	Effectiveness of blockade.
1899.	The "Olinde Rodriguez"	67 Davis, Supr. Ct. Rep. (U.S.), 510	Effectiveness and notoriety of blockade.

In "Die Vier Gebrœders"[1] the Admiralty Judge[2] condemned certain brandy and salt as contraband, bound for Dunkirk. The Lords, however, appear to have considered it impossible to treat them as such, and proceeded to consider whether they might not be condemned on account of the blockade of Dunkirk. But as this blockade, though notorious, did not appear judicially in the cause, plea and proof were ordered upon the claimant giving security for costs.

The "Betsy" (Murphy, master),[3] was the case of a ship and cargo taken by the British at the capture of Guadeloupe, and asserted to have broken a blockade by entering that place. Sir W. Scott's judgment, so far as is material to the question of blockade, was as follows:—

"On the question of blockade three things must be proved: first, the existence of an actual blockade; secondly, the knowledge of the party; and, thirdly, some act of violation either by going in, or coming out with a cargo laden after the commencement of blockade.

". . . It is necessary, however, that the evidence of a blockade should be clear and decisive. In this case there is only an affidavit of one of the captors, and the account which is there given is: 'That on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadeloupe to put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all, though it cannot be meant that they commenced against all at once, for it is notorious that they were commenced against them separately and in succession.' It is further stated, 'that in January, 1794 (but without any more precise date), Guadeloupe was summoned, and was then put into a state of complete investment and blockade.'

"The word complete is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication. But from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated 'that on the 1st of January, after a general proclamation to the French Isles, they were put into a state of *complete* blockade.' It was a term, therefore, which was applied to all those islands at the same time under the first proclamation.

"The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade; it is clear, indeed, that it could not in reason be held to produce the effect which the captors

[1] Burrell, 159 (1759).

[2] Sir T. Salusbury. This judge entertained large views on the denomination of contraband, and in the "St. Jacob" (Burr. 160) condemned as such a cargo of oil and lemons.

[3] 1 Rob., 92 (1798).

erroneously ascribe to it. From the misapplication of these phrases in one instance, I learn that we must not give too much weight to the use of them on this occasion, and from the generality of these expressions I think we must infer that there was not that actual blockade which the law is now distinctly understood to require.

"But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering, and from the declaration of the municipality of Guadeloupe, which states 'the island to have been in a state of siege.' It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in these seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances, and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy which we require to constitute a blockade. I cannot, therefore, lay it down that a blockade did exist till the operations of the forces were actually directed against Guadeloupe in April."

The "Henrick and Maria"[1] was a Danish vessel, taken on a voyage from Norway to Amsterdam, 1798. It appears she was boarded by a British man-of-war, and a notice was inscribed on ship's papers that she was not to proceed to any Dutch port. There was at that time no blockade which extended to all Dutch ports, but there was a blockade of Amsterdam. The master informed the naval officer giving the notice that he must proceed to Amsterdam, whereupon the ship was arrested. The Court held that the form of the notice, being for all Dutch ports, was bad, and was not available by limitation for Amsterdam, and therefore the ship must be restored. The case is interesting and important upon the question as to the limits of a naval commander's authority. The judgment of Sir W. Scott was as follows:—

"There are two objections taken in this case: First, that the notice of the captor was illegal; and secondly, that the master did not in fact proceed towards Amsterdam.

"Now, the notice appears to have been 'not to proceed to any Dutch port.' To be sure that goes a great deal beyond anything which the captors had a right to prescribe; for they ought to have specified the ports to which the blockade was confined. The great point is to understand what the master apprehended was the prohibition upon him; for certainly what is represented to have passed between him and the captor cannot be conclusive.

"The master says he was captured on account of his destination to Amsterdam and because he said he must proceed thither. This, it is contended, was merely a hasty declaration of the master not carried into effect. And if the master had taken upon himself to say that upon this warning he did intend to change his course, but was seized immediately, it would be pressing the matter too hardly upon his owners not to allow

[1] 1 Rob., 146 (1799).

him time to express his determination. But he says no such thing. And if his conduct amounts to an obstinate perseverance to go there, I should hold that a blockade may be broken by obstinacy as well as by fraud; and if a master says he will go and he must go there in defiance of notice, his owners must take the consequences of his conduct.

"It is a circumstance in favour of this man that the only ships in sight were two Danish merchantmen. The sight of one vessel would not certainly be sufficient notice of a blockade; and, therefore, it is necessary that it should be signified to me that there was a blockade *de facto* before that port.

"The evidence is very imperfect on that point. I shall therefore require further information, and give both parties an opportunity of producing what they think favourable to them."

[Further proof was given of the notice which the master had received of the blockade of the Vlie passage, and Sir W. Scott resumed judgment.]

"On the former hearing it appeared some notice had been given; but I wished to obtain more particular information respecting it. The notice was written on the ship's papers to this effect: 'This ship was boarded and warned not to proceed to any Dutch port.' The master states that the ship was arrested because he said he must proceed according to the bill of lading.

"It was open to both parties to have given explanatory affidavits, but the captors have offered none; therefore, unless it is shown that they have been prevented by absence at sea or other just cause, I must take the claimants' affidavit to be true. The notice is, I think, in point of authority, illegal. At the time when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of authority, and a commander of a king's ship is not to extend it.

"The notice is also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion that if the neutral had contravened the notice he would not have been subject to condemnation.

"But that he did so rests only on verbal answers and conversation. I adhere to what I said before, that an obstinate adherence to a first intention would subject a ship to the penalty, and the owners must bear the consequences of the obstinacy of their master. But I think the conversation of this man was not an expression of final intention, but that of a man deliberating under difficulties in which he was unfairly placed. The captain of the King's ship asked the master if he knew that Holland was blockaded, and he answered 'that he did not.' This question agrees with the written notice, and shows how strange a misapprehension the commander had entertained of the nature of the blockade which he was employed to form.

"The master said 'he could not answer it to his owners to go to any place but Holland.' The commander does not point out to him any ports of Holland to which he might go, but tells him he might go to

Bremen, Hamburg, or England, and adds, 'As you must go to Holland you are my prize.' I think the notice was erroneous, and, besides, not broken, and I restore the ship."

In the "Vrow Judith,"[1] the blockade was one established *de facto*, broken by egress. Sir W. Scott said:—

"I must observe that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than that of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this Court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered before the commencement of the blockade. . . ."

He then distinguishes between the two modes of intimating blockades to neutral merchants, i.e. either diplomatically (which he prefers) or individually (where the blockade is *de facto*, and the ship comes from a distance). But no such notice is necessary in the case of egress "after the blockade has existed *de facto* for any length of time,[2] the continued fact is in itself a sufficient notice . . . notoriety . . . supersedes the necessity of particular notice."

In the "Columbia"[3] the voyage was from Hamburg to Amsterdam, and it was found that the American owners knew nothing of the investment of the latter port. But the master knew of it when he left Hamburg, and his knowledge was held to affect the owners. His sailing with that intent was also held sufficient to enable confiscation to ensue.

"But it has been said," observed the judge, "that by the American treaty there must be a previous warning. Certainly where vessels sail without a knowledge of the blockade a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required."

This was, perhaps, somewhat to cut down the operation of the treaty, reducing it to an instrument merely declaratory of the law.

The "Neptunus" (Kuyp)[4] was the case of the capture of a ship by two English cruisers about seven miles from the Dutch coast; the ship was coming out of the Texel.

Sir W. Scott, in the course of his judgment, observed:—

"There are two sorts of blockade: one by the *simple fact* only, the

[1] 1 Rob. 150 (1799).
[2] In this case eleven days.
[3] 1 Rob., 154 (1799).
[4] 1 Rob., 170 (1799).

other by a notification accompanied with the fact. In the former case, when the fact ceases, otherwise than by accident or the shifting of the wind, there is immediately an end of the blockade. But when the fact is accompanied by a public notification from the Government of a belligerent country to neutral Governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty undoubtedly of a belligerent country, which has made the notification of blockade, to notify in the same way and immediately the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time would be a fraud on neutral nations, and a conduct which we are not to suppose that any country would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto*, but I say such conduct is not hastily to be presumed against any nation; and, therefore, until such a case is clearly made out, I shall hold that a blockade by notification is, *primâ facie*, to be *presumed* to continue till the notification is revoked."

The judge also remarks on the force requisite to constitute a valid blockade:—

"In the month of September this ship sails, and is immediately stopped by these two armed vessels. But it is said that there was no blockade *de facto*, and that this small number of vessels only is a proof that there was no efficient actual blockade. I am of a contrary opinion, for surely it is not necessary that the whole blockading force should lie in the same tier, nor is it material that a vessel had escaped the rest. These ships were in the exterior line, as I understand it, and if there had been only these, I should have held them to be quite sufficient."[1]

The "Betsy" (Goodhue)[2] is an interesting case for two reasons: firstly, because it (again) asserts with emphasis the view of our Courts that a general notification to States is sufficient notice to all traders; and, secondly, because it decides that, though in the then state of intercommunication where a blockade might reasonably be considered to have determined, a vessel might be justified in making way towards the blockaded port for the purpose of inquiry at some place contiguous thereto, yet this ought not to be the entrance of the blockaded port. The facts sufficiently appear from the judgment of Sir W. Scott, which, so far as is material, was as follows:—

"The ship sailed [from America] in January last, when the owners were certainly informed of the blockade, but the distance of their country is a material circumstance in their favour. I certainly cannot admit that Americans are to be exempted from the common effect of a notification of a blockade existing in Europe. But I think it is not unfair to say, that lying at such a distance where they cannot have constant information of the state of the blockade, whether it is continued or is relaxed, it is not unnatural that they should send their ships conjecturally upon the

[1] To the same effect is the "V. Johanna" (1799). 1 Rob., p. 109.
[2] 1 Rob., p. 332 (1799).

expectation of finding the blockade broken up after it had existed for a considerable time. A very great disadvantage would be imposed upon them if they were bound rigidly by the rule which justly obtains in Europe that the blockade must be conceived to exist till the revocation of it is actually notified. For if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued. That American merchants should, therefore, send their ships upon a fair conjecture that the blockade had, after a long continuance, terminated, and for the purpose of making fair inquiry whether it had so determined or not is, I think, not exceptionable, though I certainly agree that this inquiry should be made, not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud. In the present case the blockade had been understood in America to have existed the whole winter, and therefore it was not unreasonable to suppose that by that time it might have ceased. I decree restitution."

In the later case of the "Posten,"[1] a Danish ship from Drontheim to Amsterdam, taken off the Texel, and proceeded against for a breach of the blockade at Amsterdam, the same excuse was made that her people expected to receive information on the spot. The Court said :—

"Ships must call somewhere to obtain information, for the Court will not allow the information to be obtained at the mouth of the blockaded port."

The ship was condemned.

The "Neptunus" (Hempel)[2] shows that a notification to a foreign State affects its subjects, at all events as from the time when the news might have reached them so far as physical conditions are concerned.

"The effect of a notification to any foreign Government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. . . . In the case of a blockade *de facto* only it may be otherwise, but this is a case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only is that in the former the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an

[1] 1 Rob., p. 335 (note), (1799). [2] 2 Rob., p. 110 (1799).

excuse for sailing on a doubtful and provisional destination. But this is a case of a vessel from Dantzic after the notification, and the master cannot be heard to aver his ignorance of it."

The ship, however, was restored, as the master had been misled as to the continued existence of the blockade (of Havre) by a British cruiser which he fell in with.

In the "Adelaide" (1799),[1] Scott laid down the further proposition, which it is conceived cannot be supported, that—

"If a notification is made to the principal States of Europe . . . a time would come when it would affect the rest."

If one State will not take the trouble to notify its blockades to another, it is scarcely fair to assume to affect the latter with the consequences. As a matter of fact, notification to a single important nation would be reported to every chancellery in Europe. Yet would other important nations consider themselves bound?

"Suppose," says Scott, "a notification made to Sweden and Denmark, it would become the general topic of conversation; and it would be scarcely possible that it should not have travelled to the ears of a Bremen man; and although it might not be so early known to him as to the subjects of the States to which it was immediately addressed, yet in process of time it must reach him, and must be considered to impose the same observance of it on him. It would strongly affect him with knowledge of the fact that blockade was *de facto* existing. Therefore, on these grounds I should hold that, although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet, in a reasonable time, it must affect neighbouring States with knowledge, as a reasonable ground of evidence; and I think," he adds, "I do not strain the matter in laying down this rule."

This amounts to a position according to which there may be cases in which neither diplomatic nor individual notification, nor notoriety of facts (as distinguished from notoriety of proclamations), is requisite. It removes the theory of the validity of diplomatic notification entirely from what was, in the "Neptunus," its pivot, namely, the assumed duty of Governments to protect their subjects, and the possible remedy of the latter against the former. For what relation subsisted between the Swedish and Danish Governments and the Bremen mariner?

The "Juno"[2] is one of the comparatively few cases in which the effect of a licence is considered. We have remarked that a general licence exempting all ships of a particular nation from the operation of a blockade invalidates the latter. In the "Juno," a United States vessel arrived from America at Falmouth for Amsterdam, having sailed in ignorance of the fact that the latter

[1] 2 Rob., 111, note (*a*). [2] *Ibid.*, 116 (1799).

port was blockaded. She then obtained a licence to go to "the ports of the Vlie, Emden, Rotterdam, or elsewhere." The case turned on the strict interpretation of the licence, which was held to have been complied with by a voyage to Amsterdam, and which was, moreover, held to imply a licence to come out again. Scott again reiterated that—

"A ship that has entered previous to the blockade may retire in ballast, or taking a cargo that had been put on board before the blockade; this is the distinction which I have held, and shall hold, till I am corrected by a superior Court."

The "Hurtige Hane" (Dahl)[1] was the case of a Danish ship taken in the act of entering the Texel: plea, necessity from distress and want of water. The Court condemned the ship, and in the course of the judgment observed :—

"Nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port; considerations of all inferior nature, such as avoiding higher fees or slight difficulties, will not be sufficient. Nothing less than an unavoidable necessity which admits of no compromise and cannot be resisted, will be held by me to be a justification of this offence."

The Court found as a fact that the vessel might very well have put into some port, equally convenient, which was not blockaded.

The "Welvaart Van Pillaw"[2] was a Prussian ship taken for a breach of the blockade of Amsterdam, having sailed thence with a cargo. Sir W. Scott, in the course of his judgment, observed :—

"It is said that it was not a matter of notoriety in Amsterdam that the blockade was still continued, . . . and therefore that a ship in the blockaded port may plead ignorance. But I am to remember that this is not a Dutch ship, but a Prussian ship, and that it was the duty of the Prussian Government, having received the public notification many months before, to have communicated it to their subjects in different ports. Another circumstance on which exemption is prayed is that she had escaped the interior circumvallation, that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument. If the principle is found that a neutral vessel is not permitted to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free. This would be a most absurd application of the principle. If that is found, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated.[3]

[1] 2 Rob., 124 (1799).
[2] *Ibid.*, 128 (1799).
[3] *Vide* Bynkershoek, Q.J.P., Lib. I, ch. XI.

Being of opinion that the principle is sound, I shall hold that if a ship that has broken a blockade is taken in any part of that voyage, she is taken *in delicto* and subject to confiscation."

In the "Jonge Petronella"[1] there was a blockade of Rotterdam notified to foreign ministers 21 March and gazetted 26 March. The vessel was seized on 28 March. The notification stated that all vessels that should attempt to enter blockaded ports "after this notice" would be amenable. The judgment was as follows:—

"There seems to be no question made as to the property of the ship. I do not think a week is sufficient time to affect the parties with a legal knowledge of this blockade. I shall therefore restore this vessel."

The time within which the existence of a blockade must be presumed to be known was again under consideration in the "Calypso" (Schultz).[2] It was proved that it was known at Amsterdam on 12 April, and inferred that it must have been known at Rotterdam on the 15th.

Again, in the "Neptunus" (Kuyp) (II)[3] the time within which Portuguese residents were affected with notice of such a blockade was considered. Hamburg claims were rejected. The shipment was made 9 to 19 July, 1798, the notification of the blockade of the port (Amsterdam) having preceded it by a month, reaching Lisbon (as the judge computed) about the end of June.

"But then it comes to this general question . . . whether the owners are, in all cases, bound merely by the act of their agents? The abstract rule is undoubtedly just that persons are bound by their agent; but two or three considerations weigh much to induce me to limit the extent and application of this principle in these particular cases. In the first place, I cannot but recollect that the law of blockade is a thing rather out of the common course of mercantile experience; it is new to merchants, and not very familiar to lawyers themselves. It might therefore be a little too rigorous to expect in the very first instance an exact compliance with the strict rule of law. A second consideration is that the agents of foreign merchants in the enemy's country, that country being under blockade, do not stand in the same situation as other agents: they have not only a distinct, but even an opposite interest from that of their principal, to fulfil the commission at all risks, as rapidly as possible, for their own private advantage, and for the public interest of their country, at that time under particular pressure as to the exportation of its produce. This may fairly be allowed to impose a strong obligation on the candour of the Court not to hold an employer too strictly bound, on mere general principles, by an agent, who may be actuated by interests different from those of his principal."

The "Caroline"[4] was a case of a cargo taken on a voyage

[1] 2 Rob., 131 (1799).
[2] 3 Rob., 173 (1800).
[3] *Ibid.*, 298.
[4] *Ibid.*, 75 (1800).

from Bayonne ostensibly to Altona, but in fact to Ostend, a blockaded port. Further proof was refused, and condemnation passed. In the course of his judgment Sir W. Scott said:—

"It becomes material to see how the cargo is entered in the ship's papers; the whole is represented as to be delivered at Altona and Hamburg. Had there been any fair contingent deliberative intention of going to Ostend, that ought to have appeared on the bills of lading; for it ought not to be an absolute declaration to Hamburg if it was at all a question whether the ship might not go to Ostend, a port of the enemy. There is then an undue and fraudulent concealment of an important circumstance which ought to have been disclosed. But it is said that it would be extremely hard on claimants if the acts of persons in France giving orders contrary to their instructions are to be held sufficient to affect them with penal consequences; and it might be so, although the hardship of being affected by the acts of agents is a hardship which the law is not very shy of imposing in a variety of cases; but it is to be recollected that the neutral claimants cannot be penally affected if they stand personally clear of the fraud which accompanies these goods."

The "Juffrow Maria Schrœder"[1] was the case of a Prussian vessel taken for a breach of the blockade of Havre. The question involved was whether there had been such a relaxation of the blockade as to constitute a legal cessation—the ship had been permitted to enter the harbour and was seized after leaving it on return. Sir Wm. Scott in discussing this question observes:—

"I cannot shut my eyes to a fact that presses upon the Court, that the blockade has not been duly carried into effect: a temporary and forced secession of the blockading force, from the accidents of winds and storms, would not be sufficient to constitute a legal relaxation: but here ships are stopped and examined and suffered to go in. The master of this particular vessel says 'that in coming out he saw no ships for forty-eight hours'; that might be accidental; but when he entered they were on the station, yet no attempt was made to prevent them from going in. No contradiction is opposed to this account, though I have no doubt that a proper application has been made to the King's ships concerned. In other cases also, it appears that no force was applied for the purpose of enforcing the blockade: the same permission was given to go in. How this happened I cannot divine, for I find the orders of the Admiralty of 27 August, 1779, were 'to block up the port of Havre,' and these seem to connect themselves with the former orders; there is, besides, a letter from Mr. Nepean to Captain Griffiths, in answer to a letter stating that the 'Fly' had examined a snow and suffered her to go in; in which Mr. Nepean writes, 'I am commanded to acquaint you that you are not to suffer any vessel to enter,' etc. There can be no doubt then of the intention of the Admiralty that neutral ships should not be permitted to go in, but the fact is that it was not in every instance carried into effect.

"What is a blockade, but to prevent access by force? If the ships stationed on the spot to keep up the blockade will not use their force for

[1] 3 Rob., 147 (1800), at p. 155.

that purpose it is impossible for a court of justice to say there was a blockade actually existing at that time so as to bind the vessel."

Ship restored.

However, in the same case, as to the cargo, the Court came to a different conclusion.[1] It would appear that the view of the Court was that there was no general relaxation of the blockade, but only an exceptional indulgence granted to certain ships, and therefore the blockade continued a valid blockade as against all to whom such indulgence was not extended, and inasmuch as the ship had been permitted to go into the harbour the master thereof might reasonably conclude that he would be permitted to go out with a cargo. But otherwise with the owners of the cargo; they had not been the recipients of this special indulgence, and therefore were not entitled to be influenced by it. Their duty was to ascertain from the belligerent whether or no the ship would be allowed to pass out, or at any rate the order directing shipment should be provisional on the blockade being raised. Further emphasis to this view was given in the case of the "Venscab,"[2] in which case Sir W. Scott observed :—

"I beg it may be understood that I hold the blockade to have existed generally, though individual ships, in some few instances, are entitled to an exemption from the penalty in consequence of the irregular indulgences shown to them by the blockading force."

In the case of the "Juffrow" cargo his judgment was on this point as follows :—

"The rule by which the Court has been induced to act towards certain vessels in consequence of the relaxed manner in which the blockade of Havre appeared to have been enforced in these particular cases by no means interferes with the general effect and operation of this blockade; on the contrary, the Court has held that there was no general relaxation, although particular vessels were considered to be protected by the loose manner in which the blockade was kept up towards them. The ship in the present case was restored on the ground that she had been allowed to go in with a cargo, and therefore might be understood to be at liberty to come out with a cargo. But the extent of that principle is to be confined to those who had been the objects of this improper indulgence. The ship was restored, but it by no means follows that the owners of the cargo stand on the same footing. That must have been shipped in consequence of criminal orders directing it to be sent on any opportunity of slipping out; it is therefore not to be argued that the release of the ship is any conclusive evidence respecting the cargo.

"Then how stands this case as to the owners of the cargo? After the blockade had been notified the most prudent conduct would have been to wait for a relaxation from the belligerent who imposed the blockade before

[1] 3 Rob., 158 (1800).
[2] *Ibid.*, see p. 159, note (1799).

they gave any orders: at any rate it could go no farther than this, that the orders should be provisional, directing shipments to be made when the blockade should be raised; as an absolute order during the continuance of a blockade, if executed, must be considered to be a breach of that blockade. Under any circumstances such a provisional order would be attended with great hazard in respect to the good faith of the enemy shipper, who may be under a temptation to ship off his goods without regard to the risk of his employer—and this risk persons giving such order must be content to take on themselves. The affidavit that has been introduced only states 'that he was ignorant at the time of shipment.' That will not be sufficient; that will not purge away the offence at the time of giving the orders. The parties must either state themselves to have been ignorant of the blockade at the time of ordering the goods, and show the grounds of their opinion arising out of any of these particular instances of relaxation to individual ships; or at least they must show that the orders were provisional. . . . I reject the application."

In the "Ocean"[1] the question again rose whether the interior carriage of goods from a blockaded port (Amsterdam) to an open port (Rotterdam), from which they were shipped to a neutral country, constituted a violation of blockade. Sir W. Scott's judgment was as follows:—

"I am inclined to consider this matter favourably, as an exportation from Rotterdam only, the place in which the cargo becomes first connected with the ship. In what course it had travelled before that time, whether from Amsterdam at all, and if from Amsterdam whether by land carriage or by one of their inland navigations, Rotterdam being the actual port of shipment, I do not think it material to inquire. On this view of the case it would be a little too rigorous to say that an order for a shipment to be made at Amsterdam should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at Amsterdam that the agents there had informed their correspondents in America that the blockade was not intended to prevent exportation; the representation of the enemy shipper could not have so acted to exonerate the neutral merchant, if otherwise liable. Were this to be allowed it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in making it.

"It happens in this case the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from Amsterdam to Rotterdam. It would be a little too much to say that by that previous act the goods shipped at Rotterdam are affected. The legal consequences of a blockade must depend on the means of blockade and the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally. The internal com-

[1] 3 Rob., 297 (1801).

munications of the country were out of its reach and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam."

Restored.

In the "Adelaide"[1] a question as to sufficiency of time was considered. The shipment was made at Amsterdam in April and May, 1799. The blockade was instituted in June, 1798, but the goods had been ordered in February and March, 1798.

"Then comes the question as to the blockade, whether there was sufficient time for countermanding the orders? . . . and whether the merchant is not bound by the acts of his agents? and whether he himself appears to have used due diligence? . . . It is a distinction of reasonable equity . . . to give rather a more liberal allowance of time for notice to persons in the situation of merchants in America."

Under all the circumstances the judge held that the American merchant was not culpably negligent, and proceeds to declare that he was not absolutely bound by his agent's act, but ought to have a fair opportunity of countermanding. With regard to shipments ordered in October, 1798, it was, on the contrary, inferred that the blockade of June must have been known in America in October.

"There are two obligations which I must presume fulfilled until the contrary is shown, because they are obligations arising out of the public duties of Governments—the duty of making immediate communication to foreign States on the part of the Government imposing the blockade, and the duty of transmitting such communication immediately on the part of those public ministers to whom it is immediately made. I cannot suppose, without very injurious imputation upon the persons entrusted with these great interests, that they did not use the utmost diligence for that purpose. Then, on the strength of these two presumptions, I have only to inquire whether there is not reason to suppose that the notification so expedited had reached America before the date of the orders in October, 1798."

And he concluded that there was.

With regard to orders given on 8 September, 1798, the Court thought it would be drawing the rule too close to hold the claim concluded.

The "Hurtige Hane" (Dahl)[2] is valuable as an exposition of the history of blockade. The cargo was shipped at Saft in Barbary for Amsterdam, and it was contended that no notification had been made to Morocco, and that Barbary merchants were entitled to special leniency.

[1] 3 Rob., 281 (1801). Cf. p. 194 *supra*, for the case of the ship. [2] 3 Rob., 324 (1801).

"On a point like this," said Sir W. Scott, "the breach of a blockade, one of the most universal and simple operations of war in all ages and countries, excepting such as were merely savage, no such indulgence can be shown. It must not be understood by them that if a European army or fleet is blockading a town or port they are at liberty to trade with that port. . . . They, in common with all other nations, must be subject to this first and elementary principle of blockade, that persons are not to carry into the blockaded port supplies of any kind. It is not a new operation of war; it is almost as old and as general as war itself."

Then, as to notice, he repeats that "after a limited time it lies *primâ facie* on the party to show that he was not apprised of the fact of the blockade," and infers that the blockade of so important a place as Amsterdam must have been well known, even though there was no notification, diplomatic or individual.

In the "Frau Ilsabe"[1] the somewhat curious point was taken that the Scheldt was included in the blockade of Holland, on account of having been appropriated to exclusive Dutch use, as between Britain and Holland, by treaties of those Powers. Sir W. Scott observed that such treaties would by no means affect the interests of other States, and that in any event the treaties were extinguished by the outbreak of war.

The "Stert,"[2] referred to in a note in the case of the "Ocean," (*supra*, p. 199) is more fully reported in Vol. IV of C. Robinson. Butter and cheese were ordered from Edam, to be shipped by inland navigation to Emden, for London. It was argued that as the plan was preconcerted to send on the goods without any other break in the continuity of the voyage than a transhipment at Emden, it was to be considered as a circuitous mode of avoiding the blockade of Amsterdam and a breach of that blockade.

Sir W. Scott:—"This is a question arising out of the blockade of Amsterdam, respecting goods put on board in a port of the Texel, for the very purpose of being sent to London, without any interruption of the voyage, but conveyed out of Holland to Emden by the means of the canal navigation, as I understand it. The question is, whether this is to be considered as a breach of the blockade? A blockade may be of different descriptions. The blockade of Amsterdam which was imposed on the part of this country was from the nature of our situation a mere maritime blockade, effected by force operating only at sea. As far as that force could be applied, it was indubitably a good and legal blockade; but as to an interior navigation, how is it a blockade at all? Where is the blockading power? . . . Can it be said that by the maritime blockade of the Seine the interior access to Havre is blockaded, so as that goods belonging to a neutral subject sent from Paris to Havre could be held subject to confiscation by virtue of that blockade? It is argued that if this course of trade is allowed, the object of the blockade, which is to distress the

[1] 4 Rob., 63 (1801). [2] *Ibid.*, 65 (1801).

trade of Holland, will be defeated. If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit of an effective remedy of this species. The Court cannot, on that ground, take upon itself to say that a legal blockade exists where no actual blockade can be applied. In the very action of a complete blockade it is concluded that the besieging force can apply its power to every point of the blockaded State. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed that this is no more than what was foreseen by the blockading State, which nevertheless thought it proper to impose it to the extent to which it was practicable. The commerce, though partially open, is still subjected to a pressure of difficulties and inconvenience; to cut off the power of immediate export and import from the ports of Holland is of itself no insignificant operation, although it may not be possible to exclude them from the benefit of an inland communication. If the blockade be rendered imperfect by this construction, it must be ascribed to the physical impossibility of the measure, by which the extent of its legal pretensions is unavoidably limited."

In the "Jonge Pieter"[1] the Court held that the despatch by a neutral merchant of goods to a neutral port, whence by land transit they were despatched to a port blockaded by sea, was not a breach of blockade. Sir W. Scott observes:—

"The blockade of Amsterdam is from the nature of things a partial blockade—a blockade by sea; and if the goods were going to Emden with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade."

The "Alexander"[2] was the case of a cargo on a voyage from Lisbon ostensibly to Altona, but actually going into Havre under pretence of being in want of provisions. Sir W. Scott held that such deviation must be presumed to be in the service of the cargo, and not an act of the master for which the owners of the cargo would not be responsible.[3] In the course of his judgment, he observed that the inference in all cases is that—

"A ship going into a blockaded port is going with an intention of disposing of the cargo."

He goes on to say:—

"The master makes no distinction nor asserts that he deviated under particular directions applying to one part of the cargo only, or that when that part was delivered under instructions unknown to the rest of the shippers, he was to go on to Altona with that part of the cargo which is the subject of the present claims. If that could have been made out, the

[1] 4 Rob., 79 (1801), at p. 83.
[2] *Ibid.*, 93 (1801).
[3] This was the converse of the "Imina" (3 Rob., 167), in which it was argued that a deviation *away* from a blockaded port ought not to benefit the cargo-owners.

Court might, perhaps, have given the claimants the benefit of that distinction. The same general cause is assigned for all, and I must suppose the whole cargo was to be there delivered. It is true that the owners of the cargo are not, in general cases, held to be affected by the act of the master, unless he is specially appointed their agent. But it would be impossible to maintain a blockade in cases of this nature, which is directed more against the cargo than against ships, if the Court did not draw the inference that a ship going in fraudulently is going in the service of the cargo with the knowledge and by the direction of the owner."

The "Potsdam"[1] was the case of a ship that, while lying in Havre, a blockaded port, was transferred by one to another neutral merchant, and then, in ballast, sailed out of Havre. Sir W. Scott gave judgment as follows:—

"It was a transfer from one neutral to another, in no manner connected with the commerce of the blockaded port. I am not disposed to think that circumstance will affect the title; the ship appears to have come out in ballast, and therefore I think the claimant's title stands clear of all objection on the ground of blockade."

But the captors were allowed their expenses.

In the "Juffrow Maria Schrœder,"[2] a quantity of goods sent into Havre in 1797, before the blockade, for the purpose of being sent on to Paris, and sold for the account of the consignor, but reshipped (as found unsaleable) by order of the neutral proprietor, during the blockade, were restored, the Court saying:—

"As the truth of this representation is not impeached, these goods are, I think, entitled to restitution. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also with equal justice to merchandise sent in before the blockade, and withdrawn *bona fide* by the neutral proprietor."

In the "Fortuna,"[3] a ship seized for violating the blockade of the Weser, the excuses were urged—(1) lack of provisions; (2) a strong westerly wind. Sir W. Scott rejected the excuse as to provisions, but, subject to proof, allowed that of the wind. He observed as follows:—

"The want of provisions is an excuse which will not, on light grounds, be received, because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighbouring port, but it can hardly ever force a person to resort exclusively to the blockaded port. What is stated respecting the wind is of a different nature."

[1] 4 Rob., 89 (1801).
[2] *Ibid.*, 89, n. (1797 ?).
[3] 5 Rob., 27 (1803)

The "Nossa Senhora de Adjuda"[1] went to Havre before the blockade of 6 September, 1803. She loaded, partly before and partly after its establishment, in ignorance of it, and sailed on 1 October. It will be remembered that in a prior case, Scott thought eleven days sufficient to affect a vessel in a port with notice that it was blockaded. But here, after twenty-five days, the master's assurance was accepted that the fact was unknown. It became a question, then, whether the French goods on board, at any rate, could not be seized. By treaty the Portuguese had a right to carry enemy's goods on their ships without molestation; and the curious point was raised that this would not extend to the taking of them out of blockaded ports (even in legitimate ignorance of the blockade). Sir W. Scott declined to deal with the point, and decided that the goods asserted to be French property were really Portuguese.

The "Spes" and the "Irene."[2] In these cases it appeared that the vessels, belonging to the same owner, were sailing from Archangel with an avowed purpose of entering the Elbe, of which there was a duly notified blockade. The owner was aware of the blockade, but informed the masters of the vessels that he did not think the blockade would long continue, and directed them to proceed to the Elbe and inquire whether the river was then under blockade. The Court held that it was contrary to the principles of the law of blockade that after a formal notification of blockade had been given a vessel might sail to the mouth of a blockaded port to inquire whether the blockade continued. The Court also held that as notification had been duly made by the State imposing the blockade, it must be assumed that foreign Governments had given due notice to their subjects. Sir W. Scott observes in his judgment:—

"It has been said that no such intelligence (of the existence of the blockade) had been received from the Consul of the State of Hamburgh, though I must presume it had; because as the notification was made to the Consul here, it was his duty to make the communication to the Consuls of his Government in foreign parts. And as the information had arrived at Hamburgh, and had been actually communicated thence to Archangel by private channels, the same communication must be supposed to have been made from public authority to the public minister; or if not, if there had been any neglect, the consequence must be imputed only to the State and its officers, who are answerable to their subjects for the consequence of their neglect. It is said, indeed, that the masters received contrary information from their Consul, and that they were told by him that the blockade was raised, though the averment does not, I perceive, distinctly state that, as appears by the evidence in this very case, but only that it would be raised before they arrived. Had the information

[1] 5 Rob., 52 (1803). [2] *Ibid.*, 76 (1804).

been more positive, it would be difficult to attribute to it any such effect as would serve to the indemnification of the parties. If this conjectural information at Archangel proved false, they must look for redress to their own Government, or to those employed under it who gave such erroneous intelligence. If the information of foreign ministers could be deemed sufficient to exempt a party from all penalty, there would be no end to such excuses. Courts of Justice are compelled, I think, to hold as a principle of necessary caution, that the misinformation of a foreign minister cannot be received as a justification for sailing in actual breach of an existing blockade. The letters of the owner inform the masters that the blockade would probably be at an end before they arrived, and direct them to proceed for the Elbe. Are these the orders which owners ought to have given? I think not. The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade to send his vessels to the very mouth of the river, and say, 'If you do not meet with the blockading force, enter; if you do, ask a warning and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry."

The question of excuses for apparent breach of blockade was considered in the "Adonis."[1] This ship had been individually warned by a frigate that Havre was blockaded, yet she was discovered standing towards that port, E.S.E. of Cape Barfleur. The explanation was that it was due to a simple mistake of the mate's, which the master was endeavouring to understand and correct. The plea being rejected as a palpable untruth, it was further considered how far the cargo-owners were involved.

The consequences of such conduct of the master, says Sir W. Scott, "must undoubtedly bind the [cargo]-owner; but the question is whether it shall do so *presumptively* or *conclusively;* and whether the party shall be let in to prove a contrary intention. I am of opinion that he cannot. I will not say that the fact may not exist, that a master should commit a barratry in a case of this kind; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. . . .

"It has been argued that the master is not the representative of the owner of the cargo. Certainly he is not, to that extent and in the same direct manner in which he is held to be the representative of the owner of the ship. On that account, in some cases, where facts have shown that the intention of the owner was pure, the Court has given the party the benefit of this distinction; for instance, where the voyage began before the knowledge of the blockade, and where the master, on being warned, has appeared to be actuated only by a personal obstinacy and perverseness in pursuing his course to the place of his original destination.[2] That is a

[1] 5 Rob., 256 (1804).
[2] As in the "Columbia," 1 Rob., 154; *supra*, p. 191.

case in which the intention of the owner is admitted to be pure, where nothing stands against it *in limine*, where there is no question of fact, whether he was consentient to the fraud; and where, if he was affected at all, it could only be by the strict legal principle, that affects the principal by the conduct of his agent. Here, the blockade was perfectly well known to all parties at the time of shipment, and therefore the question is raised, whether the owner was not consentient at first, and whether the conduct of the master is not demonstrative evidence that he was so. In my opinion the effect of all just presumption is against him . . . considering the infinite danger of admitting the shippers to distinguish their purpose from that of the master."

The "Shepherdess"[1] was taken on a voyage from America to the port of Havre. All the papers were made out for Emden, with the exception of letters which only accidentally came to light. It seems to have been allowed to vessels from America, in view of their distance from Europe, to sail for a blockaded port, even though the blockade had been notified diplomatically, on the chance of finding it unblockaded[2] at the time of arrival, just as though it were a mere blockade *de facto*. But in such a case they were expected to make inquiries as soon as they arrived in the Channel. The excuse alleged in this case was that the master was in a constant state of intoxication, and that the supercargo was really intending to prevent his taking the ship into Havre.

"If," said Sir Wm. Scott, "such an excuse could be admitted, there would be eternal carousings in every instance of violation of blockade. The master cannot, on any principle of law, be permitted to stultify himself in this manner by the pretended or even real use of strong liquors, of which, if it were a thing to be examined, the Court could in no instance ascertain the truth of the fact."

In the "Apollo,"[3] the vessel, having sailed in ignorance of a blockade of Dieppe, was duly warned of it, and on the mere declaration of the master that he would go there, coupled with the fact of his not going elsewhere forthwith, was captured. In the "Columbia,"[4] declarations by the master that he would persist in his course were treated as scarcely sufficient to justify confiscation, but in the present case the judge said:—

"It would not be the disposition of the Court to take advantage of any hasty expressions used in the moment of surprise. If a foolish declaration *was* made, apparently idle and without a persevering obstinate intention of carrying it into execution, it would, I think, be a harsh exercise of the rights of war to press such a hasty declaration to the disadvantage of the master, and more especially to the property of others,

[1] 5 Rob., 262 (1804).
[2] *Ibid.*, 264.
[3] *Ibid.*, 286 (1804).
[4] 1 Rob., 156.

entrusted in some measure to his discretion. But if such a declaration is made, and accompanied by such circumstances as impress on the mind of the Court a conviction that the master was persisting in a serious determination of acting agreeably to it, the captor is not bound to wait till he proceeds to carry his design into execution. . . .

"It is said that a master in such a situation would be under much distress and difficulty to determine *where he should go*. It may be so; but he could be under no doubt as to his negative duty, as it may be called, *that he was not to go* into the blockaded port. It must be clear and obvious to him that the neighbourhood of the blockaded port cannot be considered as the fit *locus deliberandi* for his future plans. If the Court was to admit that a master might lie to and call a council of his own thoughts, or of those of his crew, in such a place, the rights of blockade could no longer exist to any purpose; he would stay in all cases until an opportunity offered of slipping into the interdicted port. It would be practically inconsistent with the exercise of this right of war to hold that the blockading force is bound to stay by him and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge littus;* that neighbourhood is at all events to be avoided. He is bound on the first notice to take himself out of an equivocal situation, and if he obstinately refuses and neglects so to do, this Court will hold, till it is corrected by the judgment of the superior Court, that such a conduct will amount to a breach of the blockade, and subject the vessel to condemnation."

In the "Neutralitet"[1] the Court held that if a ship lie in roads which are so connected with particular ports as almost to form part of them, and such ports be subject to blockade, in the absence of urgent necessity from distress, it is a reasonable inference that the ship intended a violation of the blockade. Sir W. Scott gave the following reasons for condemnation:—

"But I will take the case as if the vessel *was not in the port*, but only *near* it. It comes then to be considered how far a neutral ship has a right to anchor in such a spot, where she may have an opportunity of slipping into a blockaded port without molestation. It will not be necessary in the present case to lay down a general principle on this point, but I am disposed to agree to a position advanced in argument that a belligerent is not called upon to admit that neutral ships can innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going farther, approach *cy près* close up to the blockaded port so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold as a presumption *de jure* that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war."

[1] 6 Rob. 30 (1805).

The "General Hamilton"[1] was the case of a ship which had been purchased in a blockaded port and having sailed on a voyage from the Seine to New Orleans, had been driven by stress of weather into a British port, where she was seized. The Court held that it was immaterial whether or no the ship had been purchased out of the proceeds of an outward cargo, and that the fact that the ship had been driven by stress of weather into a British port did not constitute a termination of the voyage. Sir W. Scott observed:—

"It is first said that the vessel had been purchased out of the proceeds of the cargo of another vessel, but that circumstance cannot avail on a question of blockade. If the ship had been *purchased* in a blockaded port, that alone is the illegal act, and it is perfectly immaterial out of what funds the vessel was purchased. Another distinction is that the vessel had terminated her voyage, and therefore the penalty could no longer attach. It is true that she had been driven into a port of this country by stress of weather; but that is not described by the master as any part of the original destination, which is represented to have been New Orleans. It is impossible to consider this accident as any discontinuance of the voyage or as a defeasance of the penalty which has been incurred."

The "Triheten"[2] deals with interruption of blockade. A blockade of S. Lucar (Spain) had been notified on 25 April. The Swedish vessel in question sailed from Sables D'Olonne for that port on 22 May, and was captured. But meanwhile, the blockade notified had been suspended, the fleet having been driven off before the notification was actually made (on 10 April). The claimants argued[3] that "the notification being defeated, the vessel would have been entitled to a warning if any blockade *de facto* had existed when she arrived." Without going so far as that—for it will be remembered that Scott countenanced blockades "by notoriety," independent of diplomatic or individual notice[4]—the Court was "not disposed to hold that the mere act of sailing for Seville or S. Lucar under the dubious representation which we have of the state of the actual blockade at that time, is sufficient to fix upon this vessel the penalty of breaking the blockade."

In the "Charlotte Christine,[5] the excuse for approaching a blockaded coast was made that there only was it supposed that a pilot could be had. It was held that an unduly close approach to the shore, which had the effect of putting the vessel under the protection of the shore batteries, rendered it liable to condemnation.

[1] 6 Rob., 61 (1805).
[2] *Ibid.*, 65 (1805).
[3] *Per* Laurence, D.C.L.
[4] *Supra*, p. 194; *infra*, p. 209.
[5] 6 Rob., 101 (1805).

"It is possible that his intention was innocent, but the Court is under the necessity of acting on the presumption which arises from such a conduct, and of inferring a criminal intention."

The "Hoffnung" (Schmidt).[1] Ord's blockade of S. Lucar was suspended by the squadron's being driven off on 10 April.[2] Collingwood was directed to resume it, and he arrived off the coast on 8 June. The "Hoffnung" sailed from Nantes on 17 July for Seville, notwithstanding the notification of 25 April to the effect that S. Lucar, its port, was blockaded. It was held that there was no sufficient notoriety of the resumption of the blockade to supply the place of the non-existent renewal of the notification.

The judge said :—

"It appears that the ports of Cadiz and S. Lucar were put under blockade by a notification of the 25th of April, but it unfortunately happened that the notification issued at a time when it became equally notorious that no blockade actually existed, since the British squadron had been recently driven off by a superior force. In a former case the question was raised whether the notification which had issued was not still operative. . . . But the Court was of opinion that it could not be so considered, and that a neutral Power was not obliged under such circumstances to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force.

"It was argued on that occasion that neutrals were bound to act upon such presumptions, and on the same principle on which it has been held that when a blockading squadron is driven off by adverse winds, they are bound to presume that it will return, and that there is no discontinuance of the blockade. But certainly the two cases are very different. When a squadron is driven off by accidents of weather, there is no reason to suppose that such a circumstance would create a change of *system*, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may lead to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions in favour of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed; and therefore, if it is to be renewed, it must proceed *de novo* by the usual course. . . ."

In the "Tutela,"[3] the vessel was loaded at Bordeaux in May and August, 1805, for S. Lucar, and captured on the 25th of the latter month.[4] It is clear that Sir W. Scott might have been disposed to restore, only that actual knowledge of the blockade was brought home to the master and consignees. At the same time, it

[1] 6 Rob., 112 (1805). [2] The "Triheten," 6 Rob., 65; *supra*, p. 208.
[3] 6 Rob., 177 (1805).
[4] See, in connexion with the dates, the "Hoffnung" and the "Triheten," *supra*.

is a distinct case of confiscation where neither diplomatic nor individual notification was made by the blockading Power.

The "Gute Erwarterung"[1] is to the same effect as the "Charlotte Christine."

In the "Maria" (Monses)[2] a case arose somewhat similar to that of the "Lisette."[3] The export was from Bremen to America, but the Weser being blockaded, the goods were taken by lighters (against which the blockade was not enforced) to the Jahde, whence the ship sailed, having taken them on board. This was asserted to be a breach of the blockade of Bremen, not because the goods had originally come from that town,[4] but because the fact that the goods were really exported once for all from thence was patent on the face of the ship's papers, which disclosed a through charter-party from Bremen to America. There were also the further facts that the "Maria" herself had come from Bremen, and that thus both she and the lighters had actually passed through the lines of the blockade—though, owing to certain relaxations in favour of the coasting trade, the lighters were permitted to do so. However, the judge held that the relaxation was wide enough to permit lighters to take out goods from Bremen.

In the "Charlotte Sophia,"[5] where ship and goods went separately from blockaded Hamburg to Tonningen, whence the ship left for Algeciras with the goods on board (the charter-party providing on its face for the through voyage), it was held that the blockade of Hamburg had been broken, no such relaxation being proved as had been conceded to Bremen.

The "Rolla"[6] is an important case on the establishment and notification of blockades by naval authorities in remote parts of the world. A blockade of Montevideo was notified by the British commander of the unfortunate La Plata expedition to the Spanish Governor at the blockaded place, and this without any instructions from the British Government. It was alleged that, if it was a proper blockade at all, it was one *de facto* only, and not aided by the presumptions which attach to one which is duly notified.

"It was contended," said the Court, "that the power of imposing a blockade is altogether an act of sovereignty, which cannot be assumed or exercised by a commander without special authority. But . . . a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed. On stations in Europe, where Government is *almost* at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may

[1] 6 Rob., 182 (1805). [2] *Ibid.*, 201 (1805). [3] *Infra*, p. 212.
[4] See the "Stert," 4 Rob., 65; the "Ocean," 3 Rob., 297.
[5] 6 Rob., 204, note (1806). [6] *Ibid.*, 364 (1807).

be different. But in distant parts of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy as against the enemy himself, for the more immediate purpose of reduction. . . . However irregularly he may have acted towards his own Government, the subsequent conduct of Government in adopting that enterprise . . . will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned. . . .

"The second question that arises is whether the blockade was imposed in a legal form. All that is necessary to make a blockade effectual and valid is that it shall be communicated in a credible manner . . . any communication which brings it to the knowledge of the party in a way that could leave no doubt in his mind as to the authenticity of the information would be that which ought to govern his conduct and will be binding upon him."

He then recites the proceedings that had taken place, and declares that between June, when Sir H. Popham arrived, and 23 September, when he notified the authorities of Montevideo, no validity could be attached to anything that had passed. For though the commander affected to consider a blockade in progress, it was loosely kept up. But the Judge continues, approving the notification of September:—

"The usual mode of communicating the intelligence undoubtedly is, *not to the hostile Government*, but to neutral States, and when the more regular form is practicable, it is proper that it should be observed. But here it was not *practicable*. Sir Hume Popham took the only method that could be adopted by sending to the governor of the place, and by desiring him to make it known to the subjects of neutral Powers who had no consuls or agents resident there to whom it could be more formally addressed."

This, of course, is of importance only so far as egress is concerned: and we have seen that the blockaded port early becomes affected with notice of the blockade by evident notoriety. We have also seen that it was considered of strict right that a ship should take out cargo already on board before the institution of the blockade. Popham's notice limited this egress to seven days, and refused liberty to remove any cargo except that which had been carried in. The Court held that this did not invalidate the blockade, because it was a restriction "imposed by the commander himself, who might possibly find himself under circumstances that would make such a restraint perfectly justifiable, though no such circumstances are stated." This is tantamount to denying any right to bring away cargoes, except as a concession: which is in accordance with modern practice, but scarcely what would have been inferred from the earlier cases.

The Judge then touches on the extremely important topic of

the bearing of individual relaxations on the continuance of the blockade, and expresses himself with some emphasis.

"It is then said . . . that the blockade was irregularly maintained by the blockading force, in suffering some ships to go in and others to come out, which would tend to deceive other persons, and would therefore violate the effect of the notification. And I confess if I was satisfied of the fact that such instances did occur, I should be disposed to admit the conclusion that such a mode of keeping up, or rather relaxing, the blockade, would altogether destroy the effect of it. For what is a blockade but a uniform, universal exclusion of all vessels not privileged by law? If some are permitted to pass, others will have a right to infer that the blockade is raised.[1] If it was shown, therefore, that ships not privileged by law have been allowed to enter or come out, from motives of civility or other considerations, I should be disposed to admit that other parties would be justified in presuming that the blockade had been taken off."

He adds that a liberation or omission to seize vessels on account of strategical reasons, such as shortness of hands, would not have this effect.

The "Lisette."[2] In this case a vessel sailed from the Elbe to Tonningen, under a charter party to take on board a cargo of goods from Malaga, which were to be sent from the Elbe in lighters. The goods were so shipped and sailed on 6 September. Capture was effected on the 26th, after the blockade of the Elbe had been notified (on 25 September) to be withdrawn. The Court held that the penalty was discharged by the raising of the blockade between the time of sailing and the capture. Sir W. Scott gave judgment as follows:—

"The Court has already restored the ship, but it is said this passed on grounds which will not apply to the cargo; that the ship had gone from Hamburgh *in ballast*, but that the goods are to be considered as taken in one uninterrupted voyage commencing in an actual breach of the blockade, and continuing, as the same identical shipment, on the original destination from the blockaded port to Spain. . . . The distinction which is now taken between the case of the ship and the cargo cannot, I think, be sustained. In the former case of the 'Charlotte Sophia'[3] both the ship and the cargo were condemned, and this ship had been engaged in precisely the same course of trade. The master had taken on board the cargo, knowing it to have come from Hamburgh in breach of the blockade, and under an engagement to carry it on to the ultimate port of illegal destination. One visible distinction of fact between the two ships is immaterial, viz. that this vessel had gone from Hamburgh in ballast, whilst in the former case the ship had a few articles on board, though the bulk of the cargo was in that case also taken in at Tonningen. There is no doubt, then, that this vessel must have been condemned on the authority of that case,

[1] But see the "Maria" (Monses), *supra*, p. 210; the "J. M. Schroeder," p. 197; and the "Venscab," p. 198.

[2] 6 Rob., 387 (1807).

[3] *Supra*, p. 210.

unless one other material distinction of fact had existed, leading to a rule of law to which the Court is strongly disposed to adhere. It is this, that this vessel was not captured till the blockade had ceased. It is said that the offence was consummated by the act of sailing; so it is in a certain sense. But the ship was not *taken in delicto*, and I have not had any case pointed out to me in which the Court has pronounced an unfavourable judgment on a ship seized for the breach of a bygone blockade. I know of no such case, and certainly the same reason for rigour does not exist, because the blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue. . . . It is true, as has been observed, that the offence incurred by a breach of blockade generally remains during the voyage, but that must be understood subject to the condition that the blockade itself continues."

The "Christiansberg"[1] was the case of a ship which had sailed from Rotterdam ostensibly for Smyrna, but had put into Alicant, as asserted, in distress. The outward cargo was there sold, and another cargo taken on board, with which the vessel sailed on a destination to Copenhagen, being captured on that voyage. It appeared that the vessel had come out of Rotterdam under the benefit of an indulgence Order in Council that vessels might leave that port, which was blockaded, for the purpose of going to a neutral port; and an ostensible destination was assumed to Smyrna. But the ship, as already stated, went to Alicant, a blockaded port, under asserted distress, where the master disposed of the cargo and purchased another cargo, which the vessel was proceeding to take to Copenhagen when captured. Sir W. Scott, in condemning the ship on the ground of fraudulent evasion, gave judgment as follows:—

"I am to consider first the situation in which the ship was shut up at Rotterdam. She was, in fact, blockaded in the port of Rotterdam, and could not come out with a cargo unless going to a neutral port. The permission to go to a neutral port, if accepted, implies a contract that the destination should be *bonâ fide* pursued. The vessel avails herself of the indulgence and comes out with a professed intention of acting conformably to the order. But the fact turns out afterwards that she deposits her cargo in a port to which she would not have been permitted to go if the real intention of the voyage had been declared. This is unquestionably an act of perfidy; and I ask by what means can the order be maintained or such a conduct be repressed unless by the application of the penalty to the subsequent voyage? Until the vessel had actually entered the interdicted port, nothing appeared whether she was *in delicto* or not. Cruisers see nothing; she goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again that any opportunity is afforded of vindicating the law and of enforcing the restriction of this order. It is objected that if the penalty is applied to the subsequent voyage, it may travel on

[1] 6 Rob., 376 (1807).

with the vessel for ever. In principle, perhaps, it might not unjustly be pursued further than to the immediate voyage. But we all know that in practice it has not been carried further than to the voyage succeeding, which affords the first opportunity of enforcing the law."

The vessel was condemned.

Robinson refers to an old case reported in Stair's "Decisions," Vol. I, p. 529 (*Parkman* v. *Allen*), to the following effect:—

"That the ship was taken in her return, having taken contraband to the enemy in that voyage, which is founded upon evident reason, because, that whilst ships are going towards the enemy, it is but an intention of delinquency against the King in assisting his enemies; but when they have actually gone in and sold the contraband, it is *delictum commissum*, and though it might infer a quarrel against the delinquent whenever he could be found, yet the law of nations, liable for the freedom of trade, abridged it to the immediate return of the same voyage, because quarrels would be multiplied upon pretence of any former voyage."

Croudson v. *Leonard*[1] is a decision of the Supreme Court of the United States to the effect that the condemnation of a vessel for breach of blockade is conclusive evidence of the fact in an action to recover from insurers in a neutral court. The doctrine appeared to Johnson, J., "to rest upon three very obvious considerations: the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of reversing the decisions of the maritime courts of other nations, whose jurisdiction is co-ordinate throughout the world." Washington, J., observed that in England "the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction." All persons, he goes on to say, are parties to an action *in rem*. But this does not touch the point that the issue is not the same in the action *in rem* and the action on the insurance policy; and it is not with surprise that we read that Chase and Livingston dissented.

In *Fitzsimmons* v. *Newport Insurance Company*,[2] the United States Supreme Court discussed the British blockade of Cadiz. The brig "John," cleared from Charleston for Cadiz, was warned not to enter that port. It would seem that she arrived without knowledge of any blockade; and she was detained, and a British prize-crew put on board. But eleven days later the Admiral asked the master where he would go if the ship were released, and upon

[1] 4 Cranch, 434 (1808). [2] *Ibid.*, 185 (1808).

his replying that he would adhere to his instructions, sent the vessel to Gibraltar as upon a capture, and adjudication duly proceeded. It was urged that the condemnation was not conclusive, and was also bad on the face of it—reciting, as it did, persistence of the master in his *intention* to enter Cadiz. Passing by the question of conclusiveness, Marshall, C.J., held the condemnation bad :—

"The fact of clearing for a blockaded port is in itself innocent unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter the port, after warning by the blockading force, is the ground of the sentence.

"Is this intention (evidenced by no fact whatever) a breach of blockade? . . . Vattel says,[1] 'All commerce is entirely prohibited with a besieged town. If I lay siege to a place, or only form a blockade, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged, without my leave.'

"The right to treat the vessel as an enemy is declared by Vattel to be founded on the *attempt* to enter, and certainly this attempt must be made by a person knowing the fact."

He then quotes a treaty between the United States and Great Britain, stipulating for individual warning in cases where the blockade was unknown, and proceeds :—

"Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the fact of sailing is coupled with the intention. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign[2] court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the 'John' had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assurer could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence."

It only recites persistence, after warning, in the *intention:* whilst principle and compact require persistence in the *attempt.*

"Lingering about the place . . . or the single circumstance of not making immediately for some other port, or possibly obstinate and determined

[1] III, sec. 177.
[2] i.e. belligerent.

declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to reach the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter."

The other six judges concurred.

The "Comet"[1] decided that it is not permissible to break a blockade even for the purpose of bringing away neutral property. The suggestion has recently been made that neutrals should undertake to prevent the sailing of contrabandists and blockade-runners, belligerents in their turn resigning their power of interference with neutrals on the high seas. Passing by the vexatious inquisitions which this would impose on neutral commerce, and the enormous expense which would be incurred by neutrals in carrying out such a system of supervision and guarantee, it is clear that its adoption would cause constant friction with belligerents, who would continually complain of its inefficiency, and would raise enormous demands after the fashion of the "Alabama" claims whenever a cargo got through. Sir W. Scott seems to have been of this opinion, for the suggestion having been thrown out that the "Comet" was protected by a licence of the United States authorities, he declared:—

"Meaning to express myself with all the reverence that is due to the Governments of neutral nations, I must observe that it is not to be expected that the belligerent country should trust the preservation of its rights to the vigilance of others."

In the "Luna"[2] (which is hardly otherwise worth quoting, as it was decided on the very special circumstances of the extraordinary Orders in Council which were issued as retaliatory to the Berlin and Milan Decrees), Sir W. Scott made the remark which is now in some danger of being forgotten:—

"I cannot admit that, because the port of S. Sebastian borders on ports which are blockaded, therefore it is less accessible than any other open port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent."

In the "Nancy" (Hurd)[3] the vessel had communicated with Martinique in the absence of the blockading squadron, which had gone on an expedition to Surinam. But the squadron had left one large frigate behind it, which was "now and then" seen by the inhabitants. Held, that to constitute a blockade the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was the duty

[1] 1 Edw., 32 (1808).
[2] 1 Acton, 58 (1809).
[3] *Ibid.*, 191 (1809).

of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping vessels so communicating with each other as to be able to intercept all vessels attempting to enter. "The periodical appearance of a ship-of-war in the offing could not be supposed a continuation of a blockade" previously maintained with such unparalleled vigour that no vessel whatever was able to enter the island during its continuance. Vessel restored.

In the "Nancy" (Woodberry)[1] it was held that a port might be held to be blockaded by a vessel which was sometimes there and sometimes seven miles away. Sir W. Grant makes (if correctly reported) the unusual statement that as the commander on the station considered the force completely adequate, the Court felt it necessary to rely on his judgment.

In the "Eagle" (Marsan)[2] the claimants contended that the blockade had been periodically interrupted by prevalence of particular winds and the state of the tide, and by the exigencies of chasing; and also that licences to enter had been given to particular vessels, so that the inhabitants of Martinique did not know whether it subsisted. Without giving reasons the Court condemned the vessel.

From the "Nordstern"[3] it can be gathered what the usual course of blockade was when a hostile fleet was concerned. The ships-of-the-line were disposed seven or eight leagues from Cadiz at some distance in the offing, keeping up a communication with each other, and extending in a circle outside the mouth of the harbour, whilst the frigates and lighter vessels were placed from two to four leagues from Cadiz within the harbour, with orders to cruise as near in-shore as they could with safety, in order to watch the motions of the enemy. Communication was constantly kept up between them and the exterior squadron, and on a particular signal from the latter, the frigates were to close in as near the enemy's works as possible. It was doubtful whether any of the line-of-battleships were in sight when the "Emerald" frigate made the capture in question; nevertheless they put in a claim as joint captors. The Court of Appeals distinguished, per Grant, M.R., between a "military" and a "commercial" blockade: i.e. between a blockade intended to affect neutral commerce and a mere besetting of the enemy's fleet. It is generally understood that it is military exigency which (at all events historically) justifies the interference with commerce which a blockade involves: but in this case the besetting of the Spanish fleet in Cadiz was held to be a blockade only in a popular and loose sense, and not

[1] 1 Acton, 63 (1809). [2] *Ibid.*, 65 (1809). [3] *Ibid.*, 128 (1809).

such as to enable neutral commerce to be stopped. The *enemy* cargo found on the "Nordstern" was further held to be the prize of the actual captors alone; the battleships were not admitted to share in it.

The principles on which the whole blockading squadron is entitled to participate in prizes made by one of the ships composing it are also discussed in the "Forsigheid."[1]

In the "Little William"[2] the Court of Appeals considered the question of approaching a blockaded port for inquiry. The ship left America for Hamburg; but, if blockaded, that port was to be relinquished in favour of Tonningen. The Elbe was known to be blockaded when the vessel sailed. Sir W. Scott pronounced for the captors. But the Court of Appeals, per Grant, M.R., reversed the decision. The capture was made off the Start, so that the vessel still had opportunities for legitimate inquiry. But her papers showed an intention to make the inquiry at Heligoland, or at the mouth of the Eider (some twenty miles north of the Elbe). The Appellate Court thought that this did not necessarily mean an inquiry of one of the blockading squadron, and did not come within the prohibition against making inquiry at the mouth of a blockaded port.

It is generally sufficient to entail condemnation to sail for a blockaded port; but, says Arnold *arguendo*—[3]

"The exception in favour of American neutrals seems to be founded on the increased hardship they must labour under were no contingent destination permitted. . . . To obviate the numerous frauds which it was apprehended might be resorted to, were the permission to sail with a contingent destination not accompanied with definite rules for the purpose of obtaining accurate information as to the state of the port supposed in a state of blockade, it is required that vessels of this description shall make inquiry and ascertain the state of such port at a safe and permitted place, and in a safe and permitted manner; and to show that they entertain no disposition to elude the blockade, it is particularly necessary that such inquiry shall not be attempted to be made at the mouth of the blockaded port. This restriction," he goes on (and the Court accepted his conclusions), "is confined to the mouth of the port blockaded and to the blockading squadron at its mouth. . . ."

And Stephen, on the same side, says (p. 157):—

"The strict meaning of the restriction concerning the place at which inquiry may be legally made seems to amount to this—that no neutral vessel shall, on pretence of making such inquiry, be in a place where otherwise she was not entitled to be."

[1] 1 Edw., 124 (1809). [2] 1 Acton, 141 (1809).
[3] *Ibid.*, 150.

The "Spes"[1] was cited: but the Court pronounced for the claimants. For one thing, since the date of the "Spes," the Berlin Decree had made it dangerous to obtain information by touching at an English port, and it was necessary to proceed further for intelligence.

"To direct the inquiry to be made off the Eider appears," said Grant, M.R., "under the peculiar circumstances of this blockade, to be fair and unattended with any suspicion that fraud was intended."

This case has attracted less attention than it deserves.

Again, in the "Dispatch"[2] it was urged before the Court of Appeals that the neutral sailing with a contingent destination for a blockaded port should say in her papers where she meant to make the inquiry. The ship left America with knowledge of the blockade of Bremen and a contingent destination for that port or Tonningen.

"The intended mode," say Dallas and Jenner, "of ascertaining this material circumstance should be a prominent feature in a letter of instructions. The rule of law is positive that it must not be made at the mouth of such port. By your lordships' decision in the 'Little William' it seems it is not necessary it should be made during the prosecution of her voyage up the Channel, in a British port. . . . It becomes more necessary to require that the place shall be distinctly pointed out by the instructions."

Sir W. Grant peremptorily refused to entertain any such reasoning, and the Court refused the appeal as groundless, with costs to the claimants. All vessels, it was observed, did call at Heligoland, where information could always be obtained; and it was superfluous to require the place to be particularized.

A somewhat similar point was taken in *Yeaton* v. *Fry*.[3] In that case a policy of insurance excepted from the risks insured against, "blockaded ports." A voyage to a port not known to be blockaded was held to be covered by the policy. The exception is not of the port, but "of the risk of capture for breaking the blockade." It had been contended that the insured took upon himself the risk of ports turning out to be blockaded, and that a voyage to Curaçoa, in the prosecution of which the ship was turned away and warned by a blockading ship, so that she had to make for Tobago, sustaining damage *en route*, was outside the policy.

The blockade of San Lucar and Cadiz, and the question of its effectiveness and notification,[4] was again considered in the "Hare."[5] The original blockade, it will be remembered, was

[1] 5 Robins, 76, *supra*, p. 204.
[2] 1 Acton, 163 (1809.)
[3] 5 Cranch, 335 (1809).
[4] *Supra*, pp. 208, 209. The "Hoffnung" and the "Triheten."
[5] 1 Acton, 252 (1810).

discontinued owing to the appearance of a superior force; and it was contended that the reappearance of the British fleet was not sufficient to re-establish it. Sir W. Scott held that time must be allowed for it to become notorious (in the "Hoffnung"[1]), and that the Government at Madrid could not, in the beginning of July, have known of the blockade, the existence of which was still doubted at Cadiz on the 23rd.

In the "Hare," counsel for the claim note the difficulties in the way of affecting a neutral with notice by "notoriety."

"The fleet, indeed, appeared off the port, but . . . that fleet might have been supposed to be merely one of observation. . . . The mere knowledge of the detention of vessels, if even brought home to the master of this vessel, would have created no obligation on his part."

The causes of detention might have been very various. The Court,[2] however, considered that in this case notoriety was proved, and was sufficient. The fleet had been before the port warning off vessels for over a month.[3]

Insufficient excuses for seeking a blockaded port were put forward in the "Elizabeth,"[4] viz. loss of binnacle compass, exhaustion of crew, alleged impossibility of procuring a pilot for the safe port of destination (Tonningen). Another excuse, put forward in the "Arthur,"[5] was held insufficient, viz. that the visit was merely to obtain a pilot.

Sir W. Scott said :—

"[The party] must show that he was led there by some accident which he could not control, or by some want of information which he could not obtain. In doing this he must prove his whole case; and, however innocent his intentions may have been, he must explain his conduct in a way consistent not only with the innocence of himself and his owner, but he must bring it within those principles which the Court has found it necessary to lay down for the protection of the belligerent right of this country, and without which no blockade can ever be maintained."

An admitted justification for breach of blockade is stress of weather. In the "Charlotta"[6] it was successfully alleged, Trinity Masters being called in. Sir W. Scott seems to indicate a strong opinion that the mere calling at a blockaded port (no cargo being shipped or landed) does not necessarily involve condemnation, but that the ship may be admitted to prove that no intention of commercial dealings in the blockaded port ever existed; in which case she will be released.

"I was much inclined to hold that, although a vessel going into a blockaded port would be subject to condemnation, the legal presumption

[1] *Supra*, p. 208.
[2] Cf. the "Johanna Maria," *infra*.
[3] *Ibid.*, 202 (1810).
[4] Of Appeals.
[5] Edw., 198 (1810).
[6] Edw., 252 (1810).

that she is going in there for purposes of trade was ousted by the fact of her being taken coming out *without having delivered her cargo.* But I think that the case, in the first instance, is fit for further inquiry, because if . . . it should appear that [she went in under no distress], the legal presumption will be that she actually went in there for the fraudulent purpose of delivering her cargo: and it is not her having come out again without executing that purpose, owing to some unexpected change of circumstances, that will entirely remove the illegality. . . . Supposing the fact to be that the cargo remains the same, but that she went in meaning to dispose of it, and there found the rigour of the French decrees, or the disadvantages of the market, to be such as to frustrate the intention, in that case the delinquency of a fraudulent intention has actually been consummated, and the vessel would be subject to confiscation."

The case repays a little thought. Sir W. Scott appears to have considered the whole essence of the offence of blockade-running to consist in the matter of trading. At the present day a vessel which, for some purpose of her own, not amounting to necessity (say, to take a surgeon on board or gratuitous passengers), should enter and leave a blockaded port with her cargo intact, would stand a good chance of condemnation, however clearly it was proved that there never was any intention of trading in the blockaded port.[1] In the "Charlotta" necessity did exist; but the indication of Scott's opinion that the mere fact of exit *without trading* went far to oust the presumption of illegality is worth careful consideration.

The "James Cook,"[2] ostensibly bound for Tonningen, was found at the mouth of the Texel, and from the evidence of the crew it was evident that she intended to enter that blockaded port.

Sir W. Scott, after reiterating that cargo-owners were bound by the acts of the master, in cases where the existence of the blockade was known at the port of shipment,

"for otherwise, by sacrificing the ship, there would be a ready escape for the cargo," observed:—

"The ship is captured in a place where the fact is conclusive against her, for it has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry. *That* in itself is a consummation of the offence, and amounts to an actual breach of the blockade."

In *The Maryland Insurance Co.* v. *Woods*[3] the point was again raised as to the conclusiveness in the U.S. of a foreign prize judgment, in an action on a policy of insurance. The voyage of the "William and Mary" was "from Baltimore to La Guayra, with liberty of one other neighbouring port," and so back to Baltimore.

[1] Cf. "The Olinde Rodriguez" (*infra*, p. 250), and Vattel, III, § 177.
[2] Edw., 261 (1810).
[3] 6 Cranch, 29 (1810).

A blockade of Curaçoa had been diplomatically notified, and was generally known in Baltimore at the date of sailing. The ship was proceeding beyond La Guayra, when she was captured for breach of the blockade. It was asserted that the consequent condemnation was conclusive on the underwriters. The judgment turned on the construction of expressions in the policy intended to have the effect of denying to it such an effect.

Incidentally, Marshall, C. J., observes that orders had been issued by the British Government to consider only such West Indian ports blockaded as were actually so:[1] and in those cases to warn vessels off before effecting a capture. The Chief Justice declares that under these circumstances it was quite proper for a neutral to sail for a blockaded port on the chance of being warned away. Until warning, she is in the situation of a ship having no notice of the blockade.

The circumstances in which a master may abandon his voyage on receipt of information from a belligerent cruiser that it would be an illegal one are discussed in *King* v. *Delaware Insurance Co.* (*per* Marshall, C. J.).[2]

In the "Drie Vrienden"[3] a ship left a blockaded port, on hearing that her own country was likely to be involved in a war with the territorial Power. Necessity was held to justify this exit, although a cargo was taken out, since without it the enemy would not allow the vessel to leave. That the danger must be immediate and pressing is proved by the "Wasser Hundt."[4] This ship was lying at Kiel, a port affected by the British Orders in Council. On a rumour that the French proposed to seize all colonial produce that might be found in that port, the ship left for Wismar. It was at first argued that there was a continuous voyage from New York (whence the goods had originally come) to Wismar; but this being rejected, the plea of necessity was raised.

"Will political and remote speculations of this kind," said Sir W. Scott, "give the parties a right to violate the Orders in Council? If these apprehensions, so entertained and so extended to remote consequences, are to authorize the violation of a blockade, one does not see how any blockade is to be supported."

Parenthetically one may suggest that the danger is not so serious as it looks: blockades of neutral ports are not very frequent, and not entitled to much encouragement.

"The party smells danger at a distance, and satisfies himself that the French army was assembled for no other purpose than to seize American

[1] Cf. letters of British Admiralty and Minister; 3 Wheaton's Rep., Appx., pp. 12, 13.
[2] 6 Cranch, 71 (1810).
[3] 1 Dods., 269 (1813). [4] *Ibid.*, 270 n. (1810).

property. But suppose his apprehensions were well founded, would that justify his violating the rights of another country? Certainly not. He is to rely on his neutrality, and look to his own Government for protection. That the French, in this apprehended march, the creature of his own imagination, might have been guilty of excesses, can give him no right to shove aside the British Orders in Council."

This is somewhat too strongly expressed, since it suggests that under no circumstances is a neutral justified in leaving a blockaded port with a cargo. But the "Drie Vrienden"[1] (three years later) corrects that impression. There a rumour current in S. Martin's (Isle of Rhé) of impending war between Prussia and France was held to justify a Prussian ship in leaving that port with a cargo without which the French would not have permitted her to sail.

In *Williams* v. *Armroyd*,[2] Marshall, C. J., declined to refuse to recognize condemnations proceeding in France under the Milan Decree, although that document had been declared a violation of "national law" (i.e. the law of nations) by the United States Legislature.

"Unquestionably the Legislature which was competent to make [that declaration] was also competent to . . . give it effect by the employment of such means as its wisdom should suggest. Had one of those been, that all sentences pronounced under it should be considered as void and incapable of changing the property . . . this Court could not have hesitated to recognize the title of the original owner in this case. But the Legislature has not chosen to declare sentences of condemnation pronounced under this unjustifiable decree absolutely void. It has not interfered with them. They retain, therefore, the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object—whatever opinion co-ordinate tribunals may entertain of their own property, or of the laws under which they were rendered."

In the "Arthur,"[3] Sir W. Scott declared that under the special circumstances of the retaliatory "blockades" established by the Order of Council of 26 April, 1809, the usual requirements as to the method of its maintenance did not apply.

"The blockade . . . was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation round the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade which has arisen from the violent and unjust conduct of the enemy was maintained by a ship stationed anywhere in the neighbourhood of the coast, or (as in this case) in the river itself, observing and preventing every vessel that might endeavour to effect a passage up or down the river."

[1] *Supra.*
[2] 7 Cranch, 423 (1813).
[3] 1 Dods., 425 (1814).

In such circumstances, vessels employed in maintaining a "blockade" of a long extent of coast at different points were not considered so associated in one proceeding as to be entitled to share in one another's captures.

The general principle with regard to captures by one ship of a blockading squadron is laid down in "La Henriette,"[1] viz. that the rest are entitled to share, though not actually in sight, if they were associated with her in and necessary to the due performance of the operation.

In "La Mélanie,"[2] the "Briton" frigate, blockading Bordeaux, chased a schooner and finally captured it in presence of the British fleet blockading the Isle d'Aix. Citing an old case of 1746 before Sir Thomas Penrice, Lord Stowell refused to say that a distant glimpse of a different blockading squadron, which did not and could not assist in the capture,[3] would entitle it to a share in the prize. He went on to observe :—

"They were employed in a blockade service, of the closest and strictest kind, for the purpose of watching vessels which were earnestly seeking an opportunity to escape. They were sentinels on their post. . . . Blockading ships, it is true, are at liberty to take a prize if it comes in their way, but *they are not to chase to a distance*, for that would, in effect, be a desertion of the duty imposed upon them, and *would amount to a breaking up of the blockade*."

Whether the judge meant that any blockade would be legally broken up by absence on a long chase, or only that a besetting of a strong fleet would practically be nullified if the "blockading" fleet went away on distant chases, may be a little uncertain. We have seen that the reasonable exigencies of chasing do not generally interrupt a duly established blockade ;[4] and probably Sir W. Scott simply meant that the squadron in this case could not have weakened its force without destroying its military efficiency.

Another case of besetting men-of-war, which was not considered to involve the consequences to neutral traffic incidental to a blockade, arose at Naples in 1815, and was examined in the Naples Grant.[5] The brig "Grasshopper" claimed to participate in a grant made by the British Government in lieu of ships and stores taken from, but restored to, the Neapolitan Government. The ship alleged that from 30 April to 6 May she had cruised off the northern passages of the Bay of Naples, for the purpose of watching and blockading the said port.

"Now I agree," said Sir W. Scott,[6] "with the observation of the King's Advocate, that it would have been better, perhaps, if the blockade

[1] 2 Dods., 96 (1815). [2] *Ibid.*, 122.
[3] Cf. the "Sparkler," 1 Dods., 359 (1813), and see *supra*, p. 217 ; the "Nordstern."
[4] The "Eagle" (*supra*, p. 217). This case, however, is not a conclusive one. The Court gave no reasons. [5] 2 Dods., 273 (1818). [6] *Ibid.*, p. 280.

had been more specifically described; it turns out to be not so much a blockade of Naples as a blockade of certain ships in the Bay of Naples . . . to prevent their egress for any purpose of hostility."

But on 7 May a somewhat different line had been adopted: the senior officer proceeded (though not actually with the "Grasshopper" in company) "to blockade the Bay of Naples and the ships there"; further threatening to bombard the town if the ships and stores were not delivered up. The town thereupon surrendered, and meanwhile the "Grasshopper" had been in touch with the senior officer and had been employed in executing specific orders of his.

"It seems to me," says his lordship (p. 284), "to have been assumed, in this case, that the commencement [of the blockade] was at the time at which the summons was sent in, and that the termination of it was at the time of the actual surrender. And I entirely agree with Dr. Arnold, that if that is to be taken as the time of the actual blockade of the bay, that the title of the 'Grasshopper' was entirely revoked . . . the 'Grasshopper' was not in the Bay of Naples at that time, nor at the time of the summons, nor upon any of the intermediate days, nor at the time of the surrender; and, therefore, if that be taken as the point of law, that the time of the summons and surrender is to be so considered, then the 'Grasshopper' is not to be so entitled. But it strikes me that that is not by any means to be considered as the commencement of this blockade; but that the moment these vessels were assembled to stop the egress of the vessels in the bay is to be considered the commencement of it. . . . Now upon what ground is it to be assumed that the blockade is to be taken to have commenced from the time the summons was sent in? Is that so? The summons is usually the conclusion of the business: after the parties have taken their positions, and have made their advances, and have sounded the dispositions of the persons who are the objects of attack: but the blockade or siege commences long before that time."

In *Olivera* v. *Union Insurance Company*,[1] the United States Supreme Court adopted the principle that a vessel may be allowed to come out of a blockaded port with a cargo already laden before the blockade was instituted. A concise statement of the law of blockade is appended in a note.

Naylor v. *Taylor*[2] was an action on a policy of insurance, arising out of a capture made in virtue of the Brazilian blockade of Buenos Ayres and its ports in the River Plate. The capture was made off Montevideo, then a Brazilian port, and one hundred miles away from the nearest blockaded one. It was alleged that the blockade was invalid, or at least that the ship should have been warned; but Lord Tenterden, C.J., held—

"That the blockading fleet may lie at any distance convenient for shutting up the port blockaded, not obstructing any other—and that was the case here, for Montevideo was open, and we do not learn that there were any other ports not in a state of blockade higher up the river."

[1] 3 Wheat., 183 (1818). [2] 1 Moo. & M., 207 (1828).

It must be supposed that the destination was admittedly Buenos Ayres; and, in that case, it is quite immaterial where the capture was made, except on the analogy of the English cases which allowed vessels from America to call at a safe port in order to ascertain whether the blockade still continued. On that analogy, the ship would have been justified in making Montevideo; but the facts seem to show that she showed no intention of calling there for information or discharge. The case is a *nisi prius* one, and but for the eminence of Lord Tenterden, need hardly have been noticed.

The "Elise"[1] shows that the blockade of Archangel[2] was accompanied by a contemporaneous declaration (*not* gazetted) that fourteen days would be allowed for shipment of cargo and exit. A custom-house officer, ignorant of this relaxation, captured a vessel from Archangel in Leith Docks.

"It does not follow," says Lushington, D.C.L., "because this [Gazette] notification was so made, that therefore it is to be taken as an absolute fact that the blockade was actually imposed at that period. The 'Gazette' is only prima facie evidence of the blockade, and not conclusive. . . . It is said that the non-commissioned [captor] was entitled to avail himself of the 'Gazette,' and that he was not bound to know whether there was any such permission given to the master or not. I confess I entertain very grave doubts as to the truth of that proposition. . . . I am much inclined to think that if those in command of the British force gave full permission to certain vessels to come out of a port which appears from the 'Gazette' to have been blockaded, the seizor must take the consequence if he did not get information as soon as possible from the Government: the loss is not to fall on the innocent owner."

In the "Franciska" (Spinks, 111), Dr. Lushington explained that the "Nancy"[3] must not be pressed too far, and while approving that case, and the dictum of Grant, M.R., that a blockade which a naval commander considers sufficient must be taken to be so, he materially weakens their force by the reservations he immediately makes. If the commander is *contradicted*, the Court is at liberty to form its own opinion. It is equally free to follow its own view, if the commander appears to be mistaken in his notions as to what constitutes an effective blockade. Lushington treats the latter case as somewhat academic, conceiving the possibility unlikely. But naval officers are not necessarily omniscient.

The "Franciska,"[4] a neutral ship under Danish colours, was captured in May, 1854, at the entrance of the Gulf of Riga, for a breach of the blockade of that port. The main questions decided

[1] Spinks, 93 (1854). [2] *Supra*, p. 217.
[3] *Supra*, p. 216; 1 Acton, 63.
[4] 10 Moo. P. C. C., p. 37 (1855).

in this case were as follows:—(1) Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade unless at the time when she committed the alleged offence the port for which she was sailing was legally in a state of blockade and was known to be so by the master or owner; (2) the admiral of the fleet must be presumed to have carried with him from England sufficient authority to blockade such of the enemy's ports as he might deem advisable; (3) relaxation of blockade in favour of belligerents to the exclusion of neutrals is illegal; (4) notice of blockade must not be more extensive than the blockade itself; (5) the existence and extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and such knowledge may supply the place of a direct communication from a blockading squadron; yet the fact with notice of which an individual is so to be fixed must be one which admits of no reasonable doubt. This ship sailed in March, 1854, from Spain, with a cargo of wine and salt belonging to subjects of the Queen of Spain, for Elsinore for orders, thence for Lubeck, or some other safe port in the Baltic. On 13 May she left Elsinore and passed the Sound, where she cleared for the Baltic generally, without naming any port, and was captured on 22 May off the entrance of the Gulf of Riga by H.M.S. "Cruiser" for a breach of the blockade of Riga, and sent to England for adjudication.

It was alleged by the owner that the master had orders to proceed to Riga if it was not in a state of blockade; that to ascertain whether it was so or not, he made inquiries at Copenhagen and also of H.M.S. "Rosamond," but without effect, and upon descrying the "Cruiser," the "Franciska" sailed towards her with a view of making the same inquiry, when she was captured.

On 27 January, 1855, the Judge of the Admiralty Court delivered judgment, condemning the ship and freight for a breach of the blockade on the grounds, first, that the blockade was notorious at Elsinore on 14 May, the day the "Franciska" sailed; and, secondly, that the master had deposed falsely, as in the opinion of the Court he was proceeding to violate the blockade with a full knowledge of the same. The judgment of the Privy Council is of exceptional value, and therefore, although of great length, is set out practically *in extenso*.

"At the hearing of this appeal it was contended by the appellant, first, that the ship ought to have been restored on hearing the claim, or that, at all events, further proof ought not to have been allowed to the captors.

"Second, that upon the further proof (if properly received) restitution ought to have been decreed, with costs and damages.

"As to the first point, the course of proceeding to be observed on the original hearing is very clear. In everything that regards the ship and cargo the case is to be considered, in the first instance, exclusively upon the evidence furnished by the ship itself, namely, the papers on board and the examination or the standing interrogatories of the master and some of the crew. If the case be clear upon this evidence, restitution or condemnation is decreed at once. If upon such evidence the case be left in doubt, further proof is usually allowed to the claimant only; but it may also be allowed to the captors, if in the opinion of the judge who hears the case such a course appears to be required. With respect to matters which cannot appear upon evidence furnished by the ship of the existence or non-existence, the sufficiency or insufficiency of a blockade, the Court must necessarily resort to other means of information. In this case the ship was labouring under the utmost suspicion. She had no Latin pass, which the Danish Government provides for a ship of that country. She had no papers whatever on board showing the port for which she was bound. She did not appear to have had any communication with the firm at Elsinore, from which, by the terms of her charter party, she was to receive orders as to her further destination. The master stated that he had received his orders from the owner of the ship at Copenhagen . . . and that his orders were to proceed to Memel; but if there was no blockade, and if the English warships would permit him, to proceed to Riga; and that before he was captured he was sailing for Memel. Yet it clearly appeared that he had never steered for Memel at all, but had passed that port without approaching it and had been captured at the mouth of the Gulf of Riga. . . .

"Whatever may be the demerits of the ship, she cannot be condemned unless at the time when she committed the alleged offence the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner.

"The offence imputed to the ship in an affidavit of Captain Douglas, the captor, is that she was sailing for Riga, 'and the deponent had reason to believe that the fact of the blockade of the Gulf of Riga was known at Copenhagen on the 13th of May, the day of her departure from that port.'

"The grounds of the condemnation are then stated in the judgment: 'I condemn this ship, first because I hold that the blockade was notorious at Elsinore on May 14th, the day this vessel sailed. Secondly, because the master had deposed falsely and was proceeding to violate the blockade with a full knowledge thereof. Under such circumstances he can derive no benefit from the treaty with Denmark.'

"It is not contended by the captors that after the ship sailed from Copenhagen she received any notice to affect her with knowledge of the blockade, and the questions therefore are:—

"First: Was the port of Riga on the 14th May legally in a state of blockade?

"Second: If so, had the master or owner at that time such notice of the fact as to subject his ship to condemnation?

"With respect to the evidence on the first point, it is established that on the 15th or 17th of April the admiral did establish, by a competent force properly stationed for the purpose, an effective blockade of the ports of Libau, Windau, and the Gulf of Riga; that with the exception of the 3rd and 4th of May, on which days all the blockading ships were absent from their

stations, the blockade was maintained to a time subsequent to that at which the 'Franciska' was seized, and their lordships agree with the judge in the Court below in thinking that the Admiral must be presumed to have carried with him from England authority from H.M.'s Government to institute such blockade of the Russian ports as he might deem advisable.

"But while the Admiral was taking these measures in the Baltic, the English and French Governments were taking measures at home of which he was ignorant, and which, it is contended, seriously affect the validity of the blockade in point of law.

"By an Order of H.M. in Council issued on the breaking out of the war, and dated the 29th March, 1854, provision had been made for the case of Russian merchant vessels which, at the date of the Order, should be in British ports, or which, prior to the date of the Order, should have sailed for any foreign port, bound for any port or place in H.M.'s dominions; and by another order, dated the 15th of April, after reciting the former Order so far as regarded the last-mentioned class of vessels, and that H.M., with the advice of her Privy Council, was now pleased to alter and extend it, it was ordered:—'That any Russian merchant vessels which, prior to the 15th of May, 1854, shall have sailed from any port of Russia situated either in or upon the shore or coasts of the Baltic Sea or of the White Sea, bound for any port or place in H.M.'s dominions, shall be permitted to enter such last-mentioned port or place and to discharge her cargo, and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of H.M.'s ships, should be permitted to continue her voyage to any port not blockaded.'

"It has been held, and in their lordships' opinion properly held, in the Court below, that the permission given by this Order to export goods from Russian ports in the Baltic and the White Sea, would authorize such exports from places which might at the time be in a state of blockade. Indeed, as it appears to have been the intention of the Allied Powers, as soon as possible after the commencement of the war, to blockade all the Russian ports in the Baltic, any other construction would make the order almost nugatory. The same construction must, in their lordships' opinion, be put upon the corresponding *Ordonnance* of the French Government, issued on the same 15th April, by which Russian vessels bound for any place in France or Algeria were to be at liberty to leave any Russian ports in the Baltic and White Sea before the 15th of May, and pursue their voyage and return to any port not blockaded.

"By a Russian ukase issued on the ground of the Orders made by the Allied Powers, six weeks from the 25th April were allowed to English and French vessels in Russian ports in the Baltic for 'taking on board their cargoes and for an unobstructed departure for foreign ports.'

"The English Order in Council of the 15th April had provided only for Russian vessels bound to British ports, and the French *Ordonnance* of the same date for Russian vessels bound to French ports, but by a further French *Ordonnance* dated the 26th April free passage was ordered to be given to all Russian vessels loaded in Russian ports on French account for French ports or on English account for English ports up to the 15th of May.

"As regards export, therefore, from the Baltic ports by the effect of these several ordinances, all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports was

removed; and though British and French vessels would, by the general law of nations, be liable to confiscation for breach of blockade by sailing from blockaded ports with cargoes taken on board after notice of blockade, and the permission to export is by the Orders in terms confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

"In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the law of nations such exclusion would be justifiable, and if not, in what manner and to what extent neutral Powers are entitled to avail themselves of the objection.

"That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment here under review:—'The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent or take for himself the right of carrying on commercial intercourse prohibited to neutral nations, and therefore no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of States not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations which could be with truth asserted to maintain a contrary doctrine.'

"The learned judge, after discussing the question how far licences to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary law of nations and the blockades introduced during the last war by the Berlin and Milan decrees on the one hand, and the British Orders in Council on the other, and between special licences granted for a particular occasion and licences granted indiscriminately, proceeds: 'I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit,' and he concludes in these words: 'With respect to the present question, I, therefore, have come to the conclusion that as Russian vessels might have left the ports of Courland up to the 11th of May, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance.' The learned judge holds that such relaxation does not affect the general validity of the blockade.

"In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade that was open to him in time of peace, subject to

the exception of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war or by holding intercourse with a place which he has besieged or blockaded."

Mr. Pemberton Leigh then quotes passages from Grotius and other jurists, and proceeds:—[1]

"These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce whether by egress or ingress. In the 'Frederick Molke,' 1 Rob. 87, he says: 'What is the object of a blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place.' In the 'Betsy' (1 Rob. 93): 'After the commencement of a blockade a neutral cannot, I conceive, be allowed to interfere in any way to assist the exportation of the property of the enemy.' In the 'Vrow Judith' (1 Rob. 151): 'A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation.' In the 'Rolla' (6 Rob. 372): 'What is a blockade but a uniform universal exclusion of all vessels not privileged by law?' In the 'Success' (1 Dods. 134): 'The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded.'

"It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But we have great difficulty in assenting to this proposition. In the first place, the particular relaxation which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the Court, it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which at the institution of the blockade were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports, may have been of little or no value to neutrals.

"The Counsel on both sides understood that the learned judge below in this case intended thus to limit the rights of neutrals and to place neutral vessels only in the same situation as Russians under the Order in Council. Their lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a

[1] See p. 93, *supra*.

general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port seems hardly consistent with the existence of any blockade at all.

"Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points at which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

"But the ambiguity in which all these questions are left by the Order in Council of the 15th April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other, and what restrictions, affords, in our opinion, another strong argument against the legality of the blockade in this case. If a partial modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent in order to learn therefrom the decision of its Court of Admiralty whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

"If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time she sailed for that port, for in truth no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence.

"We have considered the objections to the blockade only as it is affected by the Orders in Council of the 15th April, which relate to egress from Russian ports, and to this view of the case the arguments at the Bar were confined both before the Judge below and before us. But it may not be immaterial to advert to the position in which Russian vessels at this time stood with respect to ingress into the Baltic ports, and to consider whether a certain class of such vessels, namely, those which at the breaking out of the war were in British or French ports, were not at liberty to sail with their cargoes for the ports to which they were bound, although such ports might be blockaded.

"By the Order in Council of the 29th March already referred to, it was ordered 'that Russian merchant vessels in any ports or places of H.M.'s dominions should be allowed until the 10th of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places, and that such Russian merchant vessels, if met at sea by any of H.M.'s ships, should be permitted to continue their voyage, if on examina-

tion of their papers it should appear that their cargoes were taken on board before the expiration of the above term. Provided that nothing therein contained should extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited, or contraband of war, or any despatch of or to the Russian Government.'

"There is here an enumeration of the several particulars which are to exempt a vessel from the Order, and to leave her, of course, subject to capture as enemies' property. But the attempt to enter a blockaded port is not amongst the exceptions, nor is there any prohibition against entering such port. An enemy's ship commits no offence against the law of nations by attempting to elude a hostile squadron and enter a blockaded port; she has a perfect right to do so if she can. She is already subject to seizure in another character, but does not incur any penalty by breach of blockade. If, therefore, her liability to seizure as an enemy is to be removed, but her liberty to sail in security to her port of destination is to be restricted to such ports as may not be in a state of blockade, it should seem that such restriction ought to be specified.

"Accordingly, in the next paragraph of this Order, which applies to a different class of vessels, the restriction is specified. Russian merchant ships, which at the date of the Order are on their voyage from foreign to British ports, are to be permitted to unload their cargoes and forthwith to depart and continue their voyage to any port not blockaded.

"By the corresponding *Ordonnance* of the French Government of the 27th March, permission is granted to Russian vessels in French ports for six weeks, 'de se rendre directement au port de destination sans qu'ils soient dans l'intervalle susceptibles d'être capturés.' There is no exception of blockaded ports. By subsequent orders of both Governments the period for leaving certain distant ports was extended to six weeks after promulgation of the Order. The same observations that have been made with respect to the cases of egress may be repeated with respect to ingress, namely, that if all the Russian ports were to be blockaded, and if a permission to a Russian vessel to sail to her port of destination was to be subject to a tacit exception of blockaded ports, such permission would be delusive and hardly consistent with good faith towards the enemy.

"No doubt ships of one belligerent at the outbreak of war found in the ports of another, into which they have entered for peaceful purposes, with the expectation of the continuance of peace, form an exceptional class which has a strong claim to an indulgent exercise of the right of capture, and an express permission to such ships to enter their port of destination, though blockaded, might perhaps not affect the validity of the blockade. It might fall within the class of cases alluded to by the learned Judge of the Court below, of licence granted in particular cases upon special grounds. Such a case is very distinguishable from one where a belligerent, with a view to the interests of his own commerce, permits enemies' ships to bring to him cargoes from their own ports, though he at the same time insists on a blockade of such ports against neutrals.

"Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed

to the claimant in the Court below from the alleged notoriety of the blockade from the 14th of May at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

"It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

"To this proposition we are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

"The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved the consequences must be the same. The reasoning of the learned Judge of the Court below in this case and the language of Lord Stowell in the 'Adelaide,' reported in the note in the 'Neptunus' (2 Rob. 111), and the 'Hurtige Hane' (3 Rob. 324) are conclusive upon this point.

"But while we are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. 'Any communication which brings it to the knowledge of the party,' to use the language of Lord Stowell in the 'Rolla' (6 Rob. 367), 'in a way that could leave no doubt in his mind as to the authenticity of the information.'

"Again, the notice to be inferred from general notoriety must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification or of a particular warning, would have been legal and effectual.

"For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter a port which really is blockaded.

"This was distinctly laid down by Lord Stowell in the case of the

'Henrick and Maria' (1 Rob. 148), where an officer of the blockading squadron had informed a neutral that all the Dutch ports were blockaded, whereas the blockade was confined to Amsterdam. . . .

"Applying these principles to the evidence before us, we can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May on the subject of the blockade, that it was known there that merchant vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers which has been already alluded to, and the absence on the further proof of any affidavit on the part of the owner denying knowledge of the blockade.

"But it is contended by the appellant that the impression which thus prevailed at Copenhagen (if, in fact, there existed any general impression) on the 14th of May, was, and of necessity from the acts of the belligerent Powers must have been, that the ports of Libau, Windau, and the Gulf of Riga were blockaded (which they really were), but that all the Russian ports in the Baltic were blockaded, which they certainly were not; and that a notice to be gathered from such erroneous impressions was, on the principles already referred to, of no effect."

Mr. Pemberton Leigh then examined the details of the evidence as it applied to Copenhagen at the time the "Franciska" left that city. He referred to (1) the notification sent on 11 April from Admiral Napier, the officer commanding the blockading squadron, to the British Envoy at the Danish Court, in which he stated that the British fleet would that day sail from Kioge Bay to place in a state of blockade the whole of the Russian ports in the Baltic and in the Gulf of Finland and Bothnia; (2) the circular issued by the British Envoy at Copenhagen to ministers, chargés d'affaires, and consuls of all nations, reciting the Admiral's notification; (3) the fact of publication of the notification and circular in the Danish papers by the Government of Denmark; (4) the fact that the Admiral sent notification similar to that sent to the British Envoy at Copenhagen, to the British Ministers at Berlin, Stockholm, and the Hanse Towns; also that similar information was officially sent to the Governments of Lubeck, Hamburg, Bremen, Sweden, and elsewhere. The speaker then proceeds as follows:—

"But the important point for consideration is, what impression would these proceedings create on the public mind, and what reports on the subject would be likely in consequence of them to circulate through the ports of the Baltic? The belief which they would occasion must necessarily be, that whatever the blockade might be it was general, and extended to all the Russian ports in the Baltic, and was not confined to a few ports or to a particular division of the coast.

"There is evidence that this actually was the belief created."

(Mr. Leigh here examines this evidence, and proceeds):—

"Yet from the 'Gazette' of the 14th of August it appears that the blockade of the coast of Courland commenced on the 17th of April, that of Helsingfors and some other ports on the 26th of April, that of Revel and other ports on the 26th of May, and that of Cronstadt and others in the Gulf of Finland on the 26th of June. . . . It is clear, therefore, the real state of the blockade could not have been known at Copenhagen on the 14th of May, and that the only notice which the master could receive at that port, at that time, would be that he must not sail for any of the Russian ports; a notice which, if he had received it from a British officer, he could not, on the principles already stated, be punished for disregarding.

"If this view had been presented to the judge in the argument in the Court below, it probably would have commended his assent, since he entirely approves of the principles upon which it is founded. But unfortunately the argument before him took a different direction. The contention then appears rather to have been that there had been no blockade of any Russian ports, which could have been known at Copenhagen on the 14th of May; and that if any knowledge, however accurate, had been acquired by the master through the channel of notoriety, it would not have formed a legal ground of condemnation for an attempt to enter a blockaded port. . . . But further, though the Government and commercial classes of Denmark could hardly have been ignorant on the 14th of May that the commerce of neutrals had been subject to interruption, and that captains of British ships of war had interfered with their vessels on the allegation of a blockade of Russian ports, there were not wanting circumstances which might reasonably excite grave doubts, whether such blockade had been established with sufficient authority, or would ultimately be recognized by the British Government.

"In the first place, the intention to blockade had been duly notified to the Danish Government, and they might natually expect that as the British Government on the one side, and the Admiral on the other, had means of easy and rapid communication with Copenhagen, any measure so seriously affecting their trade as the actual blockade of any of the Russian ports would be forthwith intimated to them in the same authentic manner. It now appears why this was not done, namely, that the Admiral considered the notification of the 11th April as equivalent to notice of actual blockade, but of this, of course, the Danish Government could not have been apprised.

"Besides this, they would see that, by the British Order in Council and the French Ordinances of the 15th April issued subsequently to the notification by the Admiral of the intended blockade, a certain degree of commerce—which if the ports were blockaded would expose neutrals to confiscation—was permitted to Russian ships up to the 15th May; they would observe that no such permission was given to neutrals; and they would not unreasonably infer that such permission was not granted only because it was not required; that the permission was granted to Russians because they would be liable to capture, whether the ports were blockaded or not; that it was not extended to neutrals because, there being no blockade, there would be on their part no risk; and this impression would be confirmed by observing that, in the permission to Russian ships in the

ports of the allies to proceed on their voyages, no reference is made to blockaded ports as either included or excluded from such permission.

"Again, it might be known at Copenhagen that the rumours of blockade which prevailed were, to a certain extent at all events, so far unfounded that many of the ports which were said to be closed were, in truth, open; that as to the coast of Courland itself there had been for two days no ships of war upon the blockading station, and that on those days and the day following a very large number of ships were reported at least, whether truly or not, to have entered Riga.

"We cannot but think that these considerations might with great justice affect the credit of any reports in circulation at Copenhagen, and create a not unreasonable doubt whether any blockade of Russian ports had yet been established by a competent authority; and they go far to explain much of the testimony which might otherwise be open to severe animadversion. There has been much confusion and perplexity with respect to this blockade; there are, as usually happens in such cases, some inaccuracies and errors in the evidence on both sides. . . .

"We must advise a restitution of the ship (or rather of the proceeds, for it appears to have been sold) and of the freight. . . . There will be simple restitution, without costs or expenses to either party."

The "Ostsee"[1] was a ship which sailed from Cronstadt with a cargo of wheat, bound for Elsinore for orders, and on this voyage was captured by a British man-of-war for breach of blockade of Cronstadt and sent to England for adjudication. There was no blockade of Cronstadt at that time, and the Court held that owners of ship and cargo were entitled to restitution with costs and damages, as the seizure was made without probable or reasonable cause.

The Court further laid down the following rules which should govern the restitution of a ship seized as a prize:—

(1) The claimants may be ordered to pay to the captors their costs and expenses.

(2) The restitution may be simple restitution, without costs or expenses or damages to either party.

(3) The captors may be ordered to pay costs and damages to claimant.

Costs and damages when decreed against the captors are not inflicted as a punishment on the captors, but as affording compensation to the injured party.

In order to exempt captors from costs and damages in case of restitution, there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that ship and cargo might prove a lawful prize. What amounts to such a probable cause as to justify a capture is incapable of definition, and is to be regulated by the peculiar circumstances of each case.

[1] 9 Moo. P.C.C., 150 (1855); Spinks, 174.

It is not necessary to prove vexatious conduct on the part of the captors to subject them to condemnation in costs and damages.

Neither will honest mistake, though occasioned by an act of Government, relieve the captors from liability to compensate a neutral for damage which the captors by their conduct have caused the neutral to sustain.

In the "Johanna Maria,"[1] it was held that as Riga was *de facto* blockaded to the presumed knowledge of the neutral master who left that port, no absence of, or inaccuracies in, official notification could affect its validity. He could not be misled as to the patent fact that Riga, at all events, was under blockade.

In the "Otto and Olaf,"[2] it was said that it is scarcely possible for a ship or cargo coming out of a blockaded port to be entitled to costs and damages. "The very fact of coming out of a blockaded port with a cargo is probable cause for detention."

The "Fortuna"[3] is somewhat important on the question of destination. Where the papers and depositions are otherwise satisfactory, the mere position of the ship will not infer an illegal destination without the assistance of Trinity Masters.

"It is obvious," says Lushington, "that the Court could not safely [infer one], because so many nautical matters—such as courses, winds, and currents, must be taken into consideration, that none but persons of nautical science could safely draw any conclusion."

In this case, the captors had refused to go on with Trinity Masters, and the question remained whether there was probable cause for seizure. Unassisted by expert evidence, Lushington could see none and felt bound to decree costs and damages against the captors.

"I am told," he observed, "that the officer commanding the ships constituting the blockading force will be left at the mercy of the claimants, who will make what statements they think best for their own safety, as the captors will not be permitted to contradict it; and that captors will be compelled to pay costs and damages, though in truth and reality they have only fulfilled their duty, and captured vessels justly liable to the suspicion of breaking the blockade. And further, I am told that such an administration of the law will tend to weaken and impair the exercise of one most important belligerent right—the right of blockade. To this my answer is that, looking at all the consequences of admitting captors' evidence on such questions—to all that was said by Lord Stowell on that subject, I never will admit it till authorized by superior authority."[4]

[1] 10 Moo. P.C., 70; Spinks, 307 (1855).
[2] Spinks, 257 (1855).
[3] *Ibid.*, 307 (1855).
[4] *Ibid.*, 312.

It was added that—

"Lord Stowell expressed it as his opinion that with regard to the destination of a vessel, the evidence of the master, unless it was fairly discredited, was the most important evidence to decide the question, and is conclusive on that point."

In the "Union,"[1] Dr. Lushington held that neutrals might be admitted to prove their individual ignorance of blockades established *de facto* and validated by general notoriety. But the proof must be exceedingly cogent.

In the "Jeanne Marie,"[2] the cargo of a vessel condemned for egress from Riga was released. Instructions to bring it away had been given to the master before the blockade could have been known in Amsterdam, where the charter party was signed; and the neutral charterers were not bound by the acts of the master, who was not their agent, nor by those of the shippers who were their agents, but were at the same time interested belligerents. The captors had their costs.

Again, in the "Aline and Fanny,"[3] the papers and depositions were not allowed to be contradicted by captors' evidence. The Lubeck vessel in question, ostensibly bound to Haparanda, in North Sweden, *ex* Lubeck, was seized twenty miles from land, between 63° and 64° N., on the ground of an intention to break the blockade of Cronstadt. So the master stated her position; but a certificate signed by the officers of the capturing ship "Dragon" set forth the circumstances that the ship was running for the anchorage, and drew off on observing the British ship. Although the actual facts attending the event of capture may perhaps be allowed to be proved by captors as in the "Der Friede,"[4] yet that rule is of very limited applicability.[5]

"The Court, according to its ordinary practice—a practice affirmed and sanctioned by all the highest authorities of the law of nations—looks primarily to the ship-papers and the depositions. . . . [The captors] have not contended that on the evidence, as it now appears before the Court, condemnation could be decreed—i.e. upon the ship-papers, the depositions and log—the primary evidence in the case."

In the "Gerasimo,"[6] the Privy Council had occasion to consider the blockade of the Danube. The Russian forces in the Turkish territories were hampered by want of provisions, and it seems indisputable that Turkey, and consequently her allies, could blockade her own territory in hostile occupation just as though it were in insurrection. An Admiral's proclamation of 2 June, 1854,

[1] Spinks, 164 (1856).
[2] *Ibid.*, 167 (1856).
[3] *Ibid.*, 322 (1856).
[4] *Ibid.*, 330 (note.)
[5] *Ibid.*, 325.
[6] 11 Moo. P.C., 88 (1857.)

declared the establishment of a blockade of all those mouths of the Danube which communicated with the Black Sea, in order to stop all transit of provisions to the Russian forces. The Privy Council treated this as an intimation to neutrals that the sole object of the blockade was to stop provisions, and that egress would not be objected to: but, the primary object of blockade being to cut off all commercial intercourse, it can hardly be supposed that neutrals would in the case proposed feel themselves at liberty to continue it, merely because the imposers of the blockade had seen fit to take them into their confidence respecting their motives. The case illustrates the dangers and impropriety of a purported arbitrary limitation of a well-known process such as blockade.

The Privy Council expressed a doubt as to whether a blockade of the Danube mouths could affect a vessel sailing from Galatz, 150 miles up the river, and inclined to the contrary opinion, on account of the unfairness of fixing the inhabitants of Galatz with notice of what was taking place at the sea-coast—a somewhat strained argument, as it merely goes to the length of time requisite for the *de facto* blockade to become notorious at Galatz.

In the "Panagia Rhomba,"[1] the ship violated the blockade of Odessa, and it was held by Lushington that the cargo-owners were bound by her action, the blockade being known to them. On appeal the Privy Council approved his conclusions.

Citing the "Mercurius,"[2] they proceed:—

"The subsequent cases appear to have . . . established, that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made; and they might, therefore, by possibility, be privy to an intention of violating the blockade; such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence."[3]

"Against a rule, acted upon and promulgated to the world for so many years, the counsel for the appellants, though challenged to do so by the respondents, have not produced a single decision or dictum by any one judge or jurist in any part of the world. Under these circumstances their lordships must consider it as a settled principle of prize law by which they are bound. Holding themselves to be precluded by the rule of law from looking into the evidence in this case in order to judge of the guilt or innocence of the claimants, they can express no opinion upon this subject."[4]

In the "Hiawatha,"[5] one or two points relative to the law of blockade were treated of in the U.S. Supreme Court. The peculiar circumstances under which the "Hiawatha" was held to have

[1] 12 Moo. P.C., 168 (1858.)
[2] *Ibid.*, 188.
[3] *Ibid.*, 186.
[4] 1 Rob., 80.
[5] 2 Black, p. 635 (1862).

failed to proceed to sea within the time specified by the proclamation of 27 April, announcing the blockade of Virginia, need not be detailed. More important is the discussion of the effect of the President's language (in the general proclamation of 19 April), which purported to promise individual warning before ships could be condemned.

"It would be absurd," thought Grier, J., and the majority of the Court, "to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times; and, when caught, her captors could do nothing but warn her and endorse the warning on her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the 'Alabama' might approach, and if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurd is a *felo de se*."[1]

But Taney, C.J., Nelson, Catron, and Clifford, JJ., dissenting, remarked:—

"We think it very clear, upon all the evidence, that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and upon the merits that the ship and cargo should have been restored.

"Another ground of objection to this seizure is that the vessel was entitled to a warning endorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port. . . . We must confess that we have not heard any satisfactory answer to the objection founded on the terms of this proclamation. It has been said that the proclamation, among other grounds as stated on its face, is founded on the 'law of nations,' and hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement; and, besides, if founded upon the law of nations, it surely was competent for the President to mitigate the rigours of that code, and apply to neutrals the more lenient and friendly principles of international law."

Grier, J., was only supported by the three junior judges (two of whom had just been appointed), and by Wayne, J., of Georgia. The dissent of the Chief Justice and three senior members of the bench is therefore important.

The United States case of the "Circassian"[2] is sometimes cited

[1] This singular attempt at a *reductio ad absurdum* is an example of the hair-splitting and over-subtlety which is one characteristic vice of the Anglo-American genius for law.

[2] 2 Wall., 135 (1864).

as a case of continuous voyage, although it is to be remarked that it is really not a case of continuous voyage at all, but a simple one of determining a ship's true destination. There were papers on board clearly indicating an intention to run the blockade, e.g. the following :—

"*Memorandum of Affreightment.*—Taken on freight of Mr. Bouvet, Jun., by order and on account of Mr. J. Soubry, on board the British steamer 'Circassian,' etc., bound to Nassau, Bermuda, or Havana, the quantity, etc. Mr. J. Soubry engages to execute the charter-party of affreightment; that is to say, that the merchandise shall not be disembarked but at the port of New Orleans, and to this effect he engages to force the blockade, for account and with authority of J. Soubry. "LAIBERT, Neveu."

So, the charter-party stipulated that the ship should proceed to Nassau or Havana, as ordered on sailing, and thence "to a port of America, and to run the blockade if so ordered by the freighters."

Obviously there was here a case, as precise as could be wished, of a contingent illegal destination.

But the main interest of the "Circassian" lies in the fact that, on the day when the ship was captured, New Orleans was no longer blockaded, having been occupied by the Federal forces. The Supreme Court held that a diplomatic blockade must be presumed to continue until diplomatic notification of its discontinuance (subject to diplomatic complaint if notification is delayed); and, further, that the occupation of New Orleans did not terminate the blockade—the city being disaffected and the district (including part of the technical limits of the port) hostile.

It is almost beyond argument that these positions are wrong. Few conquered cities give the conqueror no trouble. It is not legitimate to put stress on a district by blockading a port in one's own occupation. Nor is it likely that a Government will often publish to the world the interruptions which are sustained by its own blockades.[1] It is absurd to hold that a blockade of a city which is notoriously in a conqueror's occupation must be held to subsist, *juris et de jure*, until the belligerent sees fit to consider his position sufficiently secure.

The Chief Justice (Chase) had only just (6 December) been appointed. He had previously been Secretary to the Treasury, and, before that, Governor of Ohio. A judge of nineteen years' experience on the bench of the Supreme Court, Nelson, J., dissented, in terms which are well worth partial quotation :—[2]

"I think the proof sufficient to show that the purpose of the master was to break the blockade of the port of New Orleans, and that it existed

[1] Sir W. Scott, in the "Neptunus," was evidently referring to cases in which the belligerent voluntarily raised the blockade. [2] 2 Wall., p. 155.

from the inception of the voyage; but, in my judgment, the defect of the case on the part of the captors is, that no blockade existed at the port of New Orleans at the time the seizure was made. . . . The capture and possession of the port of the enemy by the blockading force, or by the forces of the belligerent, in the course of the prosecution of the war, puts an end to the blockade and all the penal consequences growing out of this measure to neutral commerce. The altered condition of things, and state of the war between the two parties in respect to the besieged port or town, makes the continuance of the blockade inconsistent with the code of international law on the subject, as no right exists on the part of the belligerent to blockade his own ports. . . . The cessation of the blockade necessarily resulted from the capture and possession of the port and town of New Orleans. They no longer belonged to the enemy, nor were under its dominion, but were a port and town of the United States. . . . So far as intercourse with the town became material, whether commercial or otherwise, after the capture and possession, it was subject to regulation by the municipal law, which is much more efficient and absolute and less expensive than the measure of blockade. It is true these laws cannot operate extra-territorially, but within the limit of the jurisdiction . . . their control over all intercourse with the port and the town is complete. Seizures of neutral vessels and cargo on the high seas are, indeed, not admissible, but blockades are not established for the purpose of these seizures; they are but incidental to the exercise of the belligerent right against the port of the enemy.

"The proclamation of the President of the 12th of May, 1862, which announces that the blockade of the port of New Orleans shall cease after the 1st of June following, has been referred to as evidence of its continuance up to that period. But I think it will be difficult to maintain the position, . . . upon any principle of international law, that the belligerent may continue a blockading force at the port, after it has not only ceased to be an enemy's, but has become a port of its own. It is not necessary that the belligerent should give notice of the capture of the town, in order to put in operation the municipal law of the place against neutrals. The act is a public event, of which foreign nations are bound to take notice and conform their intercourse to the local laws. The same principle applies to the blockade and the effect of the capture of the port on it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood.

"I have felt it a duty to state the grounds of my dissent in this case . . . from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient and felt as a hardship when, in the course of events, the belligerent has become a neutral."

The "Andromeda"[1] decided that a libel in prize need only allege the capture as prize of war, and need not specify the grounds of the allegation.

The "Cornelius,"[2] again, was a case of ascertaining the true destination of a ship. A variety of suspicious circumstances, all

[1] 2 Wall., 481 (1864). [2] 3 Wall., 214 (1865).

appearing on the face of the ship's papers and depositions, was brought forward; the most cogent being the admission of a witness that the captain told him he intended to run the blockade. Further proof was allowed.

The vessel (a schooner) cleared from New York for an open port near Charleston, some fifty miles to the south of that city. On her way thither, she was said to have hovered by night in the neighbourhood of a blockaded inlet about twenty miles to the north of Charleston (Bull's Bay), when she was fired at by the captors without effect. On arrival at the open port she did not unload, but proceeded, after three months' delay, to return to New York; and, again arriving off Bull's Bay, she was stopped by the captors, and immediately ran for the shore, where she went aground and was seized. Nautical assessors were asked the question (which Lushington, in the "Fortuna," declined to consider proper for them), whether the deviation, if it was one, was reasonably consistent with innocence of intention with reference to the blockade. They answered it in the negative; but the Court, if it had answered it itself, could hardly have come to any other conclusion. It was unnecessary to invoke the proceedings of the "Cornelius" on her voyage out. Her conduct in making Bull's Bay when challenged by the blockaders was quite sufficient. She was certainly leaking badly, but the intention to avoid the Federal force was manifest. The disinclination of the United States to admit that a neutral is prejudiced by using her best endeavours to escape visit and search possibly led the Court to attach more importance than was necessary to subordinate indications of intention.

The question of the right of vessels to approach the blockading squadron with a view to obtaining a licence or making inquiry —a right which had been strenuously contended for by diplomatists of the United States[1]—was examined in the "Josephine,"[2] and the existence of any such right denied. The vessel left New Orleans secretly, and virtually (as was alleged) under compulsion of the Confederate authorities, who threatened to burn her cargo of cotton rather than that it should be taken with the city. On sound principles, therefore, she ought to have been restored.[3] But the master denied all knowledge of any such compulsion.

Chase, C.J., said:—

"The appellant has filed an affidavit that the master of the 'Josephine' was seeking the blockading fleet with the purpose of procuring a licence to proceed on his voyage; but the statement of the master not only does

[1] E.g. by Mr. Raguet with reference to Brazilian blockades; *vide* p. 133 *supra*, and cf. Brit. State Papers, Vol. XVI, p. 1115.

[2] 3 Wall., 83 (1865). [3] Cf. the "Drie Vrienden" (1 Dods., 269), *supra*, p. 222.

not support the affidavit, but goes far to discredit it. Nor, indeed, would the alleged intent, if proved, avail the appellant; for it would not excuse the violation of the blockade."

In the "Cheshire,"[1] the right of vessels to proceed to a blockaded port for inquiry was again denied by the Supreme Court of the United States.

"The intention to break the blockade is to be presumed from the position of the ship when captured. As already stated, she knew of the blockade when she sailed from Liverpool: she had no just reason to suppose it had been discontinued; her approach, under these circumstances, to the mouth of the blockaded port for inquiry, was itself a breach of the blockade, and subjected both vessel and cargo to seizure and condemnation. The rule on this point is well settled, and is founded in obvious reasons of policy. If approach for inquiry were permissible . . . the liberty of inquiry would be a licence to attempt to enter the blockaded port."[2]

This case of the "Cheshire" was, like the "Hiawatha" (*supra*), entirely inconsistent with the diplomatic notification that vessels would receive individual warning before being liable to capture.[3] But "it would be an absurd construction of the President's proclamation to require a notice to be given to those who already had knowledge" (per Grier, J., in the "Admiral," 3 Wall. at page 610). Apparently, the long diplomatic contentions of the United States for the admission of such a construction were not present to the judge's mind.

The "Admiral,"[4] five months after the proclamation of blockade of the Southern States by President Lincoln, and when the proclamation was known in England, sailed from Liverpool with instructions to proceed with a cargo of salt, "off the port of Savannah, and if the blockade is raised, then to proceed into port and deliver the salt according to the bill of lading; and if the blockade is not raised, then the ship to proceed to St. John's, New Brunswick"; she was captured just off Savannah. The Court in the course of its judgment observed as follows:—

"Settled rule, as established by the majority of this Court, is that a vessel which has a full knowledge of the existence of a blockade is liable to capture if she attempts to enter the blockaded port in violation of the blockade regulations, and that it is no defence against an arrest made under such circumstances that the vessel arrested had not been previously warned of the blockade, nor that such previous warning had not been endorsed on her register.

"Unlike what is usual in cases of this description, it is conceded in this case that the primary destination of the ship was to the blockaded port;

[1] 3 Wall., 231 (1865), at p. 235.
[2] On the other hand, it is a material guarantee that the blockade will be effective.
[3] *Vide* p. 240 *supra*.
[4] 3 Wall., 603 (1865).

but it is insisted that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is not an offence against the law of nations where there is no premeditated intention of breaking the blockade. Take the proposition as stated, and it is undoubtedly correct, but it is equally well established that it is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade, and this Court decided that after notification of a blockade, the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal."

In the case of the schooner "Baigorry"[1] the vessel was captured at sea in June, 1862, 100 miles from Havana, to which she was making from Calcasieu in Louisiana, one of the Confederate States to which the proclamation of blockade by President Lincoln in 1861 applied. The Chief Justice of the Supreme Court of the United States, in dealing with the question as to whether or no there was a legal blockade, observed as follows :—

"Calcasieu Pass and all the neighbouring region was in possession of the rebels, and the establishment of the blockade was well known to the officers of the schooner. The master says he saw no blockading vessels off Calcasieu when he went in or when he came out. . . . But the master says also that he saw blockading ships as he was going towards the coast of Louisiana in February, and also saw a steamer passing along the coast while the schooner was at Calcasieu. The mate says he saw steamships —not one, but several—off the coast during the same time. It is also in evidence that when the master of the 'Baigorry' saw the 'Bainbridge' [United States warship] on the afternoon before the capture, and that she was hove-to and waiting for him, he changed his course to avoid her.

"We have already held that a blockade once established and duly notified must be presumed to continue until notice of discontinuance, in the absence of positive proof of discontinuance by other evidence, and we do not think that the testimony of the master and mate that they saw no blockaders when entering or leaving Calcasieu Pass supplies such proof. On the contrary, we think that positive proof that the blockade was not discontinued is made by the admissions that blockaders were seen when the 'Baigorry' approached the coast, and that one or more steamships were seen off the coast while she lay within Calcasieu Pass.

"No attempt is made to account for her delay in sailing from the 3rd to the 26th of May after her cargo was on board, and the absence of any explanation of this circumstance warrants the inference that she was watching her opportunity to go out without being seized. It goes to establish guilty intent. So, too, the endeavour to escape from the 'Bainbridge.' No such attempt would have been made had the officers of the 'Baigorry' been unconscious of any infringement of the blockade. The proof of the violation of the blockade and of its existence both when the schooner entered and when she left Calcasieu Pass is clear."

Some misconception as to the meaning of this judgment

[1] 2 Wall., 474 (1864)

appears to exist, and certain text writers have not hesitated to affirm that the judgment is not consistent with those of Lord Stowell; the true view of this case appears to be that the Court accepted against the ship slight evidence of the fact of blockade, but, nevertheless, founded their decision upon the ground that there was, in fact, a blockading force known to the master along the coast where the ship lay, which he was successful in at first eluding.

In the "Dashing Wave,"[1] the blockade of the Texan side of the Rio Grande was considered by the United States Supreme Court. It was laid down that vessels for the Mexican side must keep on the Mexican side of the stream, both in approaching and navigating the river; and costs and expenses were allowed to captors in the case of a vessel which did not do so. The exact situation of the ship, being uncertain on the depositions, was allowed to be proved by the captors: the master absolutely denying their version.

In the "Teresita,"[2] the master and mate testified positively to the ship's being in neutral waters. Further proof was, improperly enough, allowed to the captors.[3] But it merely established that the ship had accidentally drifted into Texan waters, and costs and expenses were given against the cruiser.

The "Jenny"[4] is an unsatisfactory case. The ship came down from Matamoras on the Mexican side with cotton, anchored in Texan waters, and was proved (it is not shown how) to have taken in more cotton there. Clearly she had violated the blockade: yet the cargo taken in at Matamoras was released, and the Court relied, at least as much as on the fact of breach of blockade, on "the unsatisfactory nature of her papers," and condemned the ship and residue of cargo as enemy property.

In the "Sir William Peel,"[5] the United States Supreme Court again had a case concerning the Rio Grande blockade before them. The vessel anchored well on the Mexican side, sent the cargo up to Matamoras, and was taking in a return cargo of cotton when captured. Further proof was allowed and was adduced in the District Court as to the ownership of the cotton, apparently on the quite unfair and inadequate ground that all trade to Matamoras was suspicious. The "further proof" consisted almost entirely of general rumour.

It was urged that no such special case of doubtfulness arose as to warrant further proof being admitted, especially *ex parte* the captors. It was further pleaded that the capture had actually been made in neutral territory, and that a neutral might allege

[1] 5 Wall., 170 (1866). [2] *Ibid.*, 181 (1866). [3] Cf. the "Aline and Fanny," Spinks, 322.
[4] 5 Wall, 183 (1866). [5] *Ibid.*, 517 (1866).

this as a good ground of restitution without the concurrence of the particular neutral Power whose territory it was, though an enemy might not.

The Court held[1] that the territorial Power must interpose in the case of a neutral as well as of an enemy; and on the hazy further evidence, admitted on no definite ground of suspicion beyond the mere character of the legal voyage, it refused costs and expenses, though these were not given to the captors. The injustice of allowing the trade of a neutral port to be hampered because of its proximity to a blockaded one is evident. It is what Sir W. Scott expressly and emphatically declined to do in the case of the "Luna."[2] The trade of neutrals with Emden, Tonningen, and ports similarly situated, was most scrupulously respected during the blockades of the period when he was judge of the Admiralty. Further proof is only an indulgence allowed to claimants whose property, without it, would be condemned. For this, a case of extremely grave suspicion must be set up. It cannot be that every vessel bound for a port near the blockaded one is *primâ facie* subject to condemnation.

In the "Pearl,"[3] the capture and confiscation of the vessel was justified by the suspicions appearing on the face of the depositions of the crew, one of them having stated that she was bought, fitted, and sailed for the especial purpose of running the blockade. On this, further proof was (in accordance with sound practice) allowed the claimants, and the order specified that the claimant of the ship might produce evidence to show what use he intended to make of the ship after her arrival at Nassau. He produced none; and although a person who was associated with him swore positively that the steamer had been bought for use as a packet between the West Indies and Cuba, the Court declined, on a vague and unproved theory of his "connexion with the purchase of this *and other* vessels, and his own engagement in the suspicious traffic with Nassau," to treat his statements as worthy of credit. They inferred that the ship "was destined, either immediately after touching at [Nassau], or as soon as practicable after needed repairs, for one of the ports of the blockaded coast."

As her sole cargo consisted of ten bales of seamen's jackets and cloths (consigned to Nassau), it appears to have been the opinion of the United States Supreme Court that a vessel breaks blockade when she is proceeding to a safe port with a view of shipping a cargo for a blockaded one. There was no shred of evidence (except the owner's failure to deny the fact in so many words) that either the ship or the cloth was going through to the Con-

[1] Cf. the "Twee Gebroeders" (Alberts), 3 Rob., 162.
[2] *Supra*, p. 216. [3] 5 Wall., 574 (1866).

federacy. It may have been very likely that the surmises of the seamen and the Court were correct, and that one or both of them were going through. An international tribunal, however, does not act on surmises, but on legal evidence.

It is a pleasure to recur to the judgments of Judge Nelson, whose ripe experience and grasp of principle recall his great predecessors Story, Kent, and Marshall. In the "Flying Scud,"[1] the well-worn argument of the suspicious nature of all trade with the Rio Grande met with little encouragement. A valuable pronouncement was also made on the bearing of a previous breach of blockade on the aspect of the case.

The "Flying Scud" had admittedly broken the blockade of Texas by entering and discharging at a port (Brazos) nine miles to the north of the Rio Grande. She then went to the mouth of the river, after about two months, and anchored. On 15 July, 1863, she was chartered to take cotton from Matamoras to Havana, and eventually captured while at anchor by the United States "Princess Royal."

"The transaction," said Nelson J., "appears free from all doubt or obscurity. The claimants, for aught that is shown, had no connexion whatever with the cargo shipped from Nassau and discharged at Brazos, or with the voyage, or with the vessel, until it was chartered by Caymari to carry a cargo of cotton from Matamoras to Havana, which is dated the 15th of July, 1863. The argument, therefore, founded on suspicion that the claimants were concerned with the breach of blockade at Brazos, in the cruise of the inward voyage, is without any foundation."

The ship, however, had been condemned and no appeal entered. As she came out of the Texan port light, and then commenced a new voyage at an open port, the condemnation could hardly have been sustained. If she was still affected by the consequences of entering a blockaded port, the cargo must have been involved in her fate. The principle as laid down in the "Welvaart von Pillau" (2 Rob., 128) is that egress with a cargo is not permissible: it is at least questionable whether there is any offence at all in coming out in ballast, and hardly questionable at all that the ship does not need to return to her original starting point in order to be safe for the future.

In the "Adela,"[2] the first officer frankly stated that the "Adela" was intended to run the blockade, and judgment passed accordingly, in spite of the denial of the master and other witnesses.

In the "Sea Witch,"[3] the vessel was out of her direct course from Vera Cruz for New Orleans (unblockaded). The suspicion was raised that her destination was Galveston (still blockaded);

[1] 6 Wall., 263 (1867). [2] *Ibid.*, 267 (1867). [3] *Ibid.*, 242 (1867).

but the Court accepted the explanation that heavy weather rendered it necessary to keep inshore.

In the "Wren,"[1] the dark devices of British shipowners were countermined by an ingenious scheme matured by the United States Consul at Havana, who incited the crew to mutiny and carry the vessel into Key West. She was there libelled for breach of blockade on the ground that she had previously run a cargo to Galveston and a return one of cotton to Havana. The Court rejected the captor's claim.

In the "Diana,"[2] the facts were similar to those of the "Sea Witch."[3] Further proof was allowed to captors and condemnation proceeded, the papers being unsatisfactory, and the master the same person as in the latter case of misfortune.

In *Geipel* v. *Smith*,[4] which was an action for breach of charter-party, Lord Chief Justice Cockburn made the following observations with reference to blockade:—

> "It is an act of a sovereign State or prince; and it is a restraint, provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through."

In the "Olinde Rodriguez,"[5] the United States Supreme Court reviewed thoroughly the law of blockade relating to (1) effectiveness, and (2) notoriety. On 27 June, 1898, the United States issued a proclamation instituting a blockade of the port of San Juan in Porto Rico. From that date to 14 July, 1898, an auxiliary cruiser—i.e. a merchant-ship temporarily taken up for purposes of war, but fast and well armed—was stationed off the port. She was replaced on 14 July by an armoured cruiser of great efficiency, "commanding a circle of thirteen miles in diameter." A French vessel, the "Olinde Rodriguez," left Havre for San Juan, among other ports, on 16 June. On 27 June she was at sea, on her way from Europe to S. Thomas. She touched at S. Thomas on 3 July, and on the following day entered San Juan. She passed out on the 5th, was boarded by the blockading auxiliary cruiser, and had a notice of the blockade endorsed. On 17 July the armoured cruiser captured her on the allegation that she was attempting to re-enter San Juan.

On these facts the District Judge at Charleston, S.C., found that there was no breach of blockade. But he admitted certain allegations of the captor's crew, and thereupon reopened the case for

[1] 6 Wall., 582 (1867). [2] 7 Wall., 354 (1868).
[3] *Supra*, p. 249. [4] L.R., 7 Q.B. 404 (1872).
[5] Davis' Supr. Ct. Rep. (U.S.), Vol. LXVII (U.S. Rep., Vol. CLXXXIV), p. 510 (1899).

further proof. It need not be said that this was improper. Further proof is an indulgence to claimants in a case which is, on their own evidence, suspicious. It is not permissible for captors to import the suspicion.[1] Meanwhile, however, the case proceeded before the District Court, on the footing that further proof and captors' evidence was admissible. The Court held that, even receiving the further proof, the blockade was not an effective one at the time of the capture. The United States authorities appealed.

Fuller, C.J. (p. 513), delivering the opinion of the Court, declared that there exists no rule of law determining that the presence of a particular force is essential in order to make a blockade effective. The phrase of the Declaration of Paris—"a force sufficient really to prevent access to the coast of the enemy"—was not meant to be literally construed. It was not intended to alter the doctrine laid down by Lord Stowell in such cases as the "Mercurius"[2] and the "Frederick Molke,"[3] and affirmed by Dr. Lushington in the "Franciska."[4]

"It cannot be," added the Chief Justice, a good deal too broadly, "that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected." He proceeds: "As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser, though sufficient in fact, is not sufficient as matter of law."

He then quotes the "Nancy"[5] (without exactly approving Sir William Grant's dictum that the opinion of the naval commander is conclusive) and the "Franciska,"[6] and dismisses particular treaties requiring the presence of at least two vessels as incapable of affecting the general law. The case of the "Arthur"[7] was less easy to dispose of. There Scott had rested the validity of a single-ship blockade on the extra-legal character of the particular blockade in question—which was not so much a blockade as the exercise of reprisals; and, as such, absolved from the normal restrictions and rules of blockade.

However, the judge observed that, in that case, a single ship *was* held sufficient; and refrained from any further comment. "Assuming," he goes on, "that the 'Olinde Rodriguez' attempted

[1] The "Haabet," 6 Rob., p. 57. [2] 1 Rob., 80, 84. [3] *Ibid.*, 86.
[4] Spinks, 128. [5] 1 Acton, 63, *supra*, p. 217. [6] *Supra*, p. 226.
[7] *Supra*, p. 223.

to enter San Juan 17 July, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade; and, if he did so, he took the risk."

There was evidence that the naval authorities had been asking for more force in the blockade of San Juan; but the Court, distinguishing between a commercial and a military blockade, thought that the suggestion of a zealous commander, "that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was, as to this vessel, ineffective in point of law."

But, although the Court did not, on this ground, agree with the District Court, it found on the facts that there was no intention to enter San Juan at all; and for this reason restored the ship, though without costs and damages, but with *costs to the captors*, "except the fees of counsel."

The point appears not to have been adverted to, that if the ship was going to San Juan at all, it was only for the purpose of carrying away passengers. Such a communication with the shore has never been held to be a breach of blockade, which is a measure of commercial stress pure and simple, and is restricted to interference with the movements of cargoes. So, at least, it is expressly defined by Lord Stowell.[1] The ground on which the course was taken of giving the captors costs was that some special obligation lies on a vessel which has received individual notice of a blockade, to give the blockaded port a wide berth in future, even though her normal and proper course towards a safe port should lead her past it. It cannot be thought that any such proposition is consistent with the English cases or with natural justice.

The facts present a striking similarity in some respects to *Reg.* v. *Hildebrandt* (the "Aline and Fanny").[2] The treatment of the two cases shows clearly the different views entertained in Great Britain and the United States as to the indulgence to be extended to captors.

[1] *Vide supra*, p. 188.
[2] Spinks, 332; *vide supra*, p. 239.

CHAPTER III

CONTINUOUS VOYAGE

THE subject of continuous voyage first came into prominence in connexion with what is known as the "Rule of the War of 1756." In the eighteenth century and earlier it was the practice of European States to exclude foreign ships from commercial intercourse with their colonies, and also from their home coasting trade; they strictly preserved their colonial and coasting trade for their own shipping. This had its disadvantages in time of war, because without maritime supremacy their jealously guarded colonies became completely isolated, the ships of the mother-country no longer daring to approach them. In such circumstances the obvious mode of relief was to throw open the traffic to "safe" ships. In 1756 France, in a position of naval inferiority to Great Britain, opened its colonial trade to Dutch ships, but excluded other neutrals. The British seized three Dutch ships on the ground that such privileged trading by neutrals was tantamount to the identification of such neutrals with the enemy, and such ships and their cargoes were declared and adjudged to be lawful prize. An interesting later instance of the application of this rule was the case of the "Rebecca,"[1] when an American ship admitted by Holland, whose foreign policy was then controlled by Napoleon, to the privileges of Dutch trade with Japan, normally an exclusive trade, was condemned as good prize. The application of this rule against neutrals gave rise to an attempt at evasion by the device of making a colourable importation into some port with which trade was not prohibited, and thence conveying the cargo to the prohibited port. The English courts held that the destination of the ship was to be ascertained not by its voyage to the port of colourable importation, but by that to the prohibited port, and that a vessel seized on its ultimate voyage from the former port was lawful prize.

The theories of commerce current during the nineteenth century tended to minimize the importance of the Rule of 1756, but although Adam Smith and his disciples struck a severe blow at the

[1] 2 Acton, 119.

doctrine that colonies should only trade with the mother-country, yet in these days, when monopoly of trade has acquired a new impetus from the commercial rivalry of modern nations, this rule cannot be regarded as obsolete, and it is no longer to "the forgotten corners of the earth's surface"[1] that we must look for possible occasions on which it may be invoked.

It is well to consider the bearing of this Rule on the doctrine of continuous voyage. Clearly a colonial voyage is none the less such merely because the vessel touches at other ports on her way, or if the cargo be landed and reshipped at the intermediate port or ports, or even if the merchant should go to the length of paying duties there, at any rate if these duties are counteracted by drawbacks. If the ship should be found with papers showing or suggesting, or in a situation incompatible with any reasonable inference but that she is going to a colonial port in the progress of an illegal voyage, then it will not matter that she is immediately proceeding from an intermediate port or from a terminus. This is all that is involved in the principle of continuous voyage, as laid down by Scott and his predecessors. It does not mean that at any part of the voyage an ultimate destination which would make the voyage improper can be guessed at by the captor. Still less does it mean that an ultimate destination of the goods which form the cargo or some part of it can be, however plausibly, guessed at so as to subject them to condemnation.

As laid down by the English courts, the principle was only applied in the last stage of the voyage, when it was a matter of direct evidence that the ship was making for the improper port. It was apparently only applied in point of fact when the same ship was concerned in both stages of the voyage.

It was a simple assertion of the truth that once a vessel was evidently making for a colonial port, having come from a continental one (or vice versa), the two parts of the voyage (if there was an intermediate port) must be looked at as a whole. It did not assert that a hypothetical second port could be assumed and tacked on for the benefit of captors, during the first stage. Nor did it assert that goods which were sent to a safe port and proceeded thence in another ship to a colony, had performed a "continuous voyage," when in fact their voyage was *ex hypothesi* discontinuous.[2]

The courts of the United States during the Civil War did what Sir W. Scott never felt at liberty to do. It is sometimes said that

[1] Walker, "Science of International Law," p. 261. A recent instance of condemnation for participation in a close trade of the enemy is that of the *Montara*, seized by the Japanese for trading with Alaska under a Russian licence to deal in sealskins.—"Times," 22 December, 1905; "Law Magazine," February, 1906, p. 220.

[2] The "William" (*infra*, p. 267) is of superior authority to the "Thomyris" (*infra*, p. 269).

they applied the principle of continuous voyage to blockade and contraband. This, of course, is not accurate. If a vessel sails with the intention of violating a blockade, it does not matter what kind of port she sails from. There is no need to piece two stages of a voyage together. If it is clear that she is going to a blockaded port, it does not matter that she is also going to a neutral one; only, it must be clear that she is going to the blockaded port. And suspicions can never prove this, apart from the ship's papers, the admissions of the ship's company, and the local situation and course of the vessel.[1] This is why Sir W. Scott never found occasion to anticipate the American courts (as he undoubtedly had many opportunities of doing). To condemn for breach of blockade there must be a clear and positive attempt of the vessel to enter the blockaded port, which involves either an admission, contradictory papers, or an otherwise inexplicable course steered. "A prize court," says Evarts truly,[2] "which observes the true principles of its jurisdiction, as acknowledged by Britain, France, and Spain, never admits doubts or difficulties from extraneous sources, and demands further proof to allay them." What the American courts were doing in such cases was not to apply the principle of continuous voyage, but to depart from the old rules of evidence. They accepted well-founded surmise as to a vessel's destination in lieu of proof. The danger of such a departure needs no comment.

When they affected to apply the principle to the matter of contraband, on the ground that ships, apparently destined for such ports as Bermuda, were really going further, they fell into precisely the same error. In both cases, instead of imitating Scott in piecing together two proved legal transactions in order to show that they composed one illegal one, they employed hypothetical suspicions of illegality in order to supply the defect of evidence.

Lord John Russell[3] confesses that the British Government "were far from pressing hard on the United States, and, in spite of remonstrances from many quarters, put no impediment in the way of the capture of British merchant ships, but placed full reliance on the courts of America for redress in case of wrongful capture by American ships of war." This is thoroughly borne out by the debates in Parliament, when Lord Derby had much difficulty in eliciting the fact that Lord J. Russell's vague statements about the rights of belligerents over ships with neutral destinations were only meant to apply to cases where the neutral

[1] The "Haabet," 6 Rob., 54; and see letter of Sir W. Scott and Sir J. Nicholl to the U.S. Minister, *apud* Story on Prize Courts.

[2] "Brief": Inner Temple Pamphlets, I.H., XXXIV, No. 4.

[3] "Recollections and Suggestions," p. 276.

destination was a merely simulated and false one. In the event, the cases were referred to the Mixed Commission, which refused to hear Mr. Evarts, or to give its reasons, and baldly disallowed the claims. Evidently a great international compromise such as this leaves the question of principle undetermined.

Gessner[1] thinks that the Foreign Office forebore to press the claim, in the hope of turning the "Springbok" precedent to profitable future account. In fact, in still more modern times, the theory of the North American courts has, without their poor justification,[2] been apparently adopted on one or two occasions by Britain and Italy.[3] The new development of the theory cuts at the root of the established doctrine according to which the direct destination of contraband must be a belligerent port, by declaring that it is enough if the articles are ultimately intended to be carried into the enemy's territory or to his forces. The unnecessarily wide scope which this allows to a belligerent's nervous surmise is patent. A neutral which has a port adjacent to belligerent territory may easily find its trade entirely paralysed by this means. Italy affected to condemn goods bound for the Red Sea littoral, on the ground that they would eventually reach Abyssinia; and Britain captured ships bound for a Portuguese African port because weapons on board were supposed to be destined for the Transvaal. It is time to say plainly that neutrals are not likely ever to permit their own trade to be threatened by such extended theories of belligerent right, or to allow their ports to be virtually closed to traffic because they happen to be convenient ports for the enemy.

The justification of such a novel infringement of neutral rights is sometimes put forward, that internal communication is now so easy that belligerents must have increased powers of stopping overland supplies. Lord Stowell had this argument *ab inconvenienti* addressed to him in the "Frau Margaretha,"[4] and refused to attach any weight to special facilities of internal communication. Nor was canal transit ever regarded as a breach of blockade; and canals are still serious rivals to railways. Nor was the carriage of

[1] "Juridical Review of the 'Springbok' Case," p. 19.

[2] Mr. Justice Nelson says: "The truth is that the feeling of the country was deep and strong against England, and the judges as individual citizens were no exceptions to that feeling. Besides, the Court was not then familiar with the law of blockade." (Quoted by Twiss, "Law Magazine and Review," 4th ser., III, 141, November, 1877). Hall remarks that the judgments are thus admitted to be founded on passion and ignorance—a dictum erased by his editor, but not unsupported by the facts. (*Vide* Hall, "International Law," ed. III, p. 695.)

[3] In the cases of the "Bundesrath," "Herzog," etc. (1900), and in that of the "Doelwijk" (1896) (see "Times," 4 January, 1900, and State Papers, LXXXVIII, p. 212, and XCIV, pp. 973 *et seq.*), the neutral ships were released and (in the former cases) a solatium paid.

[4] 6 Rob., p. 92. See also the "Stert" and the "Jonge Pieter," *infra*, pp. 262, 263; and the "Luna," *supra*, p. 216.

goods to the great smuggling emporium of Emden in Prussia ever thought to be a cause of neutral forfeiture, although Emden was within five easy miles of lagoon transit from belligerent Holland.

The unconvincing assertion that Lord Stowell's clear words laying down the necessity of an immediate belligerent destination do not mean what they appear to do, is surely the last refuge of argument. It is not upon isolated passages alone, however clear and explicit, that the conclusion of the necessity of a belligerent destination is arrived at, but upon the whole tenor of the cases reported in the books, and upon the fact that, despite every temptation to stretch the rights of Great Britain to the fullest pitch, not a single case can be found of a ship being stopped, much less condemned, when in transit to a neutral port, however suspiciously convenient for the enemy. The pretensions of the United States courts in 1862–4 were promptly and widely condemned, and it is surprising to find responsible writers endeavouring to rehabilitate them, on such slender grounds as the supposed convenience of modern belligerents affords.

The modern jurist, finding a rule of practice laid down by a continuous catena of authority from Stowell to Hall—upheld by the Court of Common Pleas in a formal decision—approving itself to common sense by the cogent and exhaustive arguments of Twiss and Evarts—treated as supplying a conclusive test in the British Admiralty Manual of Naval Prize Law during thirty-four years, and invoked with success as recently as 1900 by the German Government—must continue to believe it to be in full force, notwithstanding the "Institut de Droit International" and those theorists of the Continent who have advanced the contrary opinion. It is impossible to regard without the gravest apprehension the concession of a licence to belligerents to condemn goods all over the world on suspicions, satisfactory to themselves, that their enemies are ultimately intended to have the benefit of them. A continental jurist who regards contraband as strictly limited to weapons of warfare may feel fewer scruples about admitting such an extension.

The old reports are full of cases on questions of enemy property. Now that that ground of seizure is generally barred, the rapacity of captors oozes out in the direction of contraband.

As Twiss points out,[1] "the term *contraband of war* is the

[1] "Law Magazine and Review," 4th ser., III, 9. This article is specially commended to the perusal of the reader. Mr. Evarts' "Brief before the Mixed Commission" (Inner Temple Pamphlets, I.H. XXXIV, No. 4), is less easily accessible, but is a most important summary of the argument. See also "International Law in South Africa," chap. I (T. Baty), where the authorities are collected; and particularly L. Gessner, "Juridical Review of the 'Springbok' Case" (Inner Temple Pamphlets, *ut supra*, No. 5).

gauge, as it were, of the liberty secured to neutral trade under the second and third articles of the Declaration [of Paris], and it is not too much to say, that if the novel interpretation recently given to the term contraband of war by the Supreme Court of the United States in the case of the "Bermuda" (3 Wallace Rep., p. 515) should be adopted by the prize courts of half the Powers who have acceded to the Declaration of Paris, the Declaration, as a public act, will be little else than diplomatic waste paper, or it will aggravate the difficulties and conflicts between belligerents and neutrals which it was intended to mitigate."

It is, indeed, probable that recent attempts to extend the category of contraband and the area within which goods can be seized as such, are really motived by a half-realized desire to evade the freedom of trade proclaimed at Paris. "It will be idle," wrote Sir Travers Twiss,[1] "for the future historian of the Law of Nations to cite, in evidence of the greater mildness of modern maritime warfare towards ocean commerce, the concessions which have been made under the Declaration of Paris, in favour of *enemy's* property laden on board of a neutral ship bound to a neutral port, if *neutral* property laden on board the same ship is to be liable to confiscation under the general law, upon the *suspicion* of its ulterior destination to enemy's uses."

The paramount importance of a simple objective test by which neutral liability to capture and confiscation shall be gauged is beyond estimation, and it is highly improbable that neutrals will be any more likely to submit to its abolition in the future than in the past. "There can be no doubt," Twiss observes, "that the doctrine of 'prospective continuity' applied to the transport of merchandise on the high seas opens wide the floodgates of visitation and search, which it was one object of the Declaration of Paris to close partially, and that instead of tending to localise the future operations of maritime warfare, it is calculated to extend them to every sea."

We now turn to the cases on the subject.

The "Sarah Christina"[2] is a good instance of the kind of circumstances under which the asserted neutral destination may be disregarded. The ship's papers were for Cagliari, a neutral port; but she was captured, not in the Straits of Gibraltar on suspicion that she was eventually going to Marseilles or Toulon, but actually entering into Cherbourg.[3]

There are many cases of the same kind where the nominal destination has been held, in view of the course of the ship, or

[1] *Ut supra*, p. 271. [2] 1 Rob., 237 (1799).

[3] The usual excuse of necessity was given, as in the "Patapsco" and "Two Brothers," *infra*, p. 271.

admissions, not to be the real one. Where the ship was on her right course for the nominal destination, it was never disregarded as being a mere simulated one, unless the declarations of the master and crew admitted it or were contradictory. Such cases are the "America,"[1] the "Carolina,"[2] the "Margaretha Charlotte,"[3] the "Nancy" (Joy),[4] the "Phœnix,"[5] the "Franklin,"[6] the "Edward,"[7] the "Convenientia,"[8] the "Exchange,"[9] the "Mentor,"[10] the "James Cook,"[11] the "Snipe,"[12] the "Patapsco,"[13] the "Two Brothers,"[14] the "Santissima Coraçao,"[15] the "Hurtige Hane,"[16] the "Calypso,"[17] the "Richmond,"[18] the "Susa,"[19] the "Johanna Tholen,"[20] the "Mars,"[21] the "Maria" (Monses),[22] the "Charlotte Sophia."[23]

The "Providentia"[24] incidentally shows that the interposition of a neutral port in a colonial voyage was resorted to during the war of 1756 itself. In argument it was stated that—

"Another expedient was also at that time resorted to, of sending the produce to Monte Christi (in the island of Hayti) in the first instance, and of taking it from thence, without going at all to the French islands; but still that was considered as an evasion, and confiscation followed."

In reply, Drs. Arnold and Laurence made it clear that it was only traffic *from* Monte Christi (after the goods had come thither) and not traffic *to* Monte Christi, on the supposition that the goods were going to an ulterior improper destination, that was struck at.

"It must be remembered that the principle," they say, "was first set up to meet the case of ships sailing under special licences, to participate in the close trade, and if it was afterwards extended to ships without licences, or to cargoes taken from Monte Christi, it was merely in prosecution of the same purpose of counteracting the fraudulent trade of the enemy, which had first shown itself under the contrivance of these special licences, and of which the later practices were but a variation for the purposes of evasion."

The "Immanuel"[25] was the case of a ship which left Hamburg for S. Domingo via Bordeaux, and in reference to the capture of which Sir W. Scott definitely stated the Rule of 1756 to be still in force, notwithstanding that it had not been acted upon in the American war. Remarking that colonial trade is a close trade preserved for the benefit of the mother-country, he observes:—

"With respect to other countries, generally speaking, the colony has no

[1] 3 Rob., 36 (1800).
[2] *Ibid.*, 75 (1800).
[3] *Ibid.*, 78, n. (1801).
[4] *Ibid.*, 82 (1800).
[5] *Ibid.*, 186 (1800).
[6] 4 Rob., 147 (1801).
[7] *Ibid.*, 68 (1801).
[8] *Ibid.*, 201 (1802).
[9] Edw., 39 (1808).
[10] *Ibid.*, 207 (1810).
[11] *Ibid.*, 261 (1810).
[12] *Ibid.*, 381 (1812).
[13] 1 Acton, 270 (1810).
[14] 2 Acton, 38 (1811).
[15] *Ibid.*, 91 (1811).
[16] 2 Rob., 124 (1799).
[17] *Ibid.*, 154 (1799).
[18] 5 Rob., 325 (1804).
[19] 2 Rob., 251 (1799).
[20] 6 Rob., 72 (1805).
[21] *Ibid.*, 79 (1805).
[22] *Ibid.*, 201 (1805).
[23] 1 Acton, 56; 6 Rob., 204, n.
[24] 2 Rob., 142 (1799).
[25] 2 C. Rob., 186 (1799).

existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of Germany may find their way to Jamaica and Guadeloupe, and the sugar of Jamaica or Guadeloupe into the interior parts of Germany, but as to any direct communication or advantage resulting therefrom, Guadeloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; for commercial purposes they are not in the same planet. If they were annihilated, it would make no chasm in the commercial map of Hamburg. If Guadeloupe could be sunk in the sea by the effect of hostility at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England if it could be made the subject of a sinister act of violence. But such events would find their way into the chronicles of other countries as events of disinterested curiosity, and nothing more."

The judge proceeds, after stating that a neutral cannot take up such a trade in order to relieve a belligerent—

"It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony; why not *immediately* from France, since the same purpose is effected? It is to be answered that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufactures of France into his own country . . . and exports them afterwards to the French colony, which he does, not in their original French character, but as goods which by importation had become a part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expense; so if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother-country under a proportionable disadvantage . . ."

It cannot escape the reader that this is a somewhat lame justification of what Sir W. Scott felt to be a necessary qualification of the rule against trading with the colonies—viz. that it must not be applied when the port of destination is neutral. The slight expense of circuitous route and extra duties cannot weigh in the balance against the continued maintenance of a valuable trade. The true reason why such trade cannot be interfered with is the danger which would accrue to the *bona fide* commerce of neutral ports. The criterion of extra expense and delay was finally abandoned in the "William,"[1] where it was decided that such considerations were (as such) irrelevant to the continuity of a voyage. And Scott himself was not long in abandoning the mere fact of importation by the merchant who re-exports the goods as a sufficient ground to protect the trade from interruption.

On account of the recent suspension of the rule and the difficulty of the subject, the ship was by indulgence restored, but without freight.

[1] 5 Rob., 385; *infra*, p. 267. And the "Mercury" (Roberts) and the "Eagle," *infra*, p. 263, are inconsistent with any such test.

The "Imina"[1] laid down a rule which is expressed in clear and definite terms, and from which Sir W. Scott and his successors never departed. The ship was laden with timber fit for making masts. She was proceeding to Amsterdam, but finding it blockaded, made for Emden, just outside the belligerent frontier, and exceedingly easy of access—in fact, a notorious smuggling centre. Sir W. Scott released ship and cargo.

"This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Emden, a neutral port and destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature as to become contraband if taken on destination to a hostile port. On this point, some difference of opinion seems to have been entertained;[2] and the papers which have been brought in may be said to leave this important fact in some doubt. Taking it, however, that they *are* of such a nature as to be liable to be considered contraband, [if] on a hostile destination, I cannot fix that character on them on the present voyage. The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. . . .

"It was said that although the ship was not actually going to an enemy's port, yet the owner had meant that she should, and it was argued that as a criminal deviation by the master towards a blockaded port would not have incriminated the cargo owner, so a repentant deviation away from it ought not to release him, and that the offence must, in both instances, be judged by the act and designs of the owner. But in those cases," Scott proceeds, "there *was* the guilty act really existing at the time of capture" (the only question was whether the master's act involved the cargo owners or his principals). "In the present instance there is *no* existing *delictum*. . . . Here there is nothing requiring any explanation: the cargo is taken on a voyage to a neutral port."

It only needs to be added, that if ever there was a strong case for holding that a contraband cargo was unmistakably destined for sale in a belligerent country, this is that case. Scott deliberately refrained from laying down any such rule as that an ultimate intention to send the goods by an easy route to the enemy could be invoked in order to justify condemnation. He saw that such a rule would sap the foundations of mercantile law. One cannot read his word "real" as simply equivalent to "ultimate"—for it was almost certain that Emden was not the ultimate destination.

[1] 3 C. Rob., 167 (1800).

[2] It had been argued that the timber was not contraband, being no more fit for shipping construction than any other timber.

The "Rosalie and Betty"[1] was a mere case of enemy property, in which the probable destination of the vessel was one element in ascertaining the national character of the goods. It is, like the other cases of the kind, of no authority in cases where destination is conclusive and all important, as in questions of contraband, blockade running, and colonial trading.

The "Polly"[2] is the first case, after the war of 1756, in which continuous colonial voyages came up for decision. A United States ship sailed from Marblehead, in Massachusetts, for Spain, and was captured on the voyage. Her cargo consisted of fish, sugar, and cocoa. The fish (the principal portion of the cargo) appeared to have been shipped at Marblehead. The sugar was part of a whole cargo which the vessel had previously brought to Marblehead from Havana and discharged; the sugar (after she had been repaired) being put on board again. The cocoa had been brought from another Spanish colony (Venezuela), in a different schooner, and it was shipped on the "Polly" at Marblehead.

"It would be the most nugatory thing in the world," say the captors' counsel, flying in the face of the judge's dictum in the "Immanuel,"[3] "to say that that trade which is not allowed to be carried on direct, should become legalized or allowable by a mere transhipment in America."

Sir W. Scott, in his judgment dismissing the case, after disposing of the question of property, observes:—

"Then there remains only the question of law, which has been raised, whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy? on which it is said, that if an American is not allowed to carry on this trade directly, neither can he be allowed to do it circuitously. An American has, undoubtedly, a right to import the produce of the Spanish colonies for his own use; and after it is imported *bona fide* into his own country, he would be at liberty to carry them on to the general commerce of Europe. . . . It is not my business to say what is universally the test of a *bona fide* importation; it is argued that it would not be sufficient that the duties should be paid, and that the cargo should be landed. If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient, that the goods should be landed and the duties paid. . . ."

This had been done in the case of the sugar, and the quantity of cocoa was insignificant. It should, however, be noted that Scott does not appear to have thought the fact material that different ships were engaged in its transport.

The "Jonge Pieter"[4] was decided on the ground of trading with the enemy. The further ground was taken in argument, of the

[1] 2 C. Rob., 343 (1800)
[2] *Ibid.*, 186 (*supra*, p. 259).
[3] *Ibid.*, 361 (1800).
[4] 4 Rob., 79 (1801).

voyage (from England to Emden) being intended to bring the cargo ultimately to Holland, that country being then blockaded.

"The probable ulterior destination to Holland," say Drs. Laurence and Swabey in opposition to this claim, "must be considered as a *new* undertaking, and the illegality attaching on such a course of trade, as residing only in *intention*, and not amenable to penalty in the present stage."

Sir W. Scott, in giving judgment, said:—

"Supposing the cargo to be American property, I am not inclined to think that it would be affected by the blockade on the present voyage. The blockade of Amsterdam is, from the nature of the thing, a partial blockade—a blockade by sea; and if the goods were going to Emden, with an ulterior destination by *land* to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade."

It will be noticed that the judge leaves out of account the case of ulterior sea transit, neither affirming nor denying that its contemplation might raise a case of breach of blockade.

In the "Stert,"[1] the ship was proceeding with dairy produce from an unblockaded port (Emden) to London. The cargo had reached Emden by internal navigation from Holland, which was under blockade, and it was alleged that this was a circuitous mode of evading the blockading forces. Sir W. Scott said:—

". . . It is argued that if this course of trade is allowed, the object of the blockade, which is to distress the trade of Holland, will be defeated. If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing, which will not admit of an effectual remedy of this species. The Court cannot, on that ground, take upon itself to say that a legal blockade exists where no actual blockade can be applied";

and consequently decreed restitution.

The "Mercury"[2] is the first case of actual condemnation on the ground of continuous voyage which is noticed in the books. The vessel was taken on a voyage from Charleston. On the standing interrogatories administered to the crew, it came out that she had brought the cargo intact from Havana, and that it had never even been landed at Charleston, although import duties had been paid "or secured" there.

In the "Eagle"[3]—again by the formal and legal original evidence—it appeared that the cargo was going to Havana from Bilbao, having been landed at Philadelphia *en route*. On this case of suspicion arising from the original evidence, further proof

[1] 4 Rob., 65 (1801). [2] 5 Rob., 400 (1802). [3] *Ibid.*, 401 (1803).

was adduced, but it was not limited to ascertaining whether duties had or had not been paid. Orders and insurances were equally relevant.

"Had it clearly appeared from those orders or insurances that the cargo was from the beginning destined for the Havana, could it be supposed that we would pay no regard to that result of the inquiry . . . but would ascribe to the payment of duties such a conclusive effect as would have rendered every other part of the inquiry perfectly nugatory?"

says Sir W. Grant, speaking of this case in the "William."

In the "Freeport,"[1] the voyage admittedly was from Cadiz to a Spanish colony, via Boston. The cargo was landed, and lay in America some time (the inference being that duty was paid), so that evidently the capture was made after the ship had left for her ultimate destination.

The "Richmond"[2] was duly documented for an incriminating port (Mauritius). The case merely decided that, having put in to S. Helena, it could not be concluded that she meant to stop there. It is cited here because Sir William Harcourt refers to it as an authority for taking ultimate destinations into account.

The "Haabet"[3] demonstrates the impropriety of admitting evidence on the part of the captors in the first instance.

"The first source of information," says Sir W. Scott, "to which the Court usually resorts, is the evidence of persons on board the captured ship. . . . The general rule of law is that on all points the evidence of the claimants alone shall be received in the first instance; and if no doubt arises on that view of the case, the Court is bound . . . to take those points as fully demonstrated. It is a possible thing indeed that witnesses may be forsworn, and that much injustice may be done, as in all references to human testimony dangers of that kind may have to be encountered. Courts of Justice must nevertheless proceed on general principles, though they will receive the evidence with caution, and weigh it against any test of credibility that can be collected from the nature and complexion of the whole case taken together."

The "Flora"[4] was a peculiar case. An Order in Council had directed the restitution of Spanish wool "consigned to this country." The "Flora's" cargo of wool was consigned to Emden, and the claimants tried to prove against the captors that it was intended to be carried on. Sir W. Scott expressed himself as to such hypothetical voyages thus:—

"Unless I could hold to the extent contended in argument that a circuitous ulterior destination to this country, either in the same ship or in other ships, is to be considered in law as one identical consignment, I fear it is out of my power to bring the case within the provisions of the Orders of Council."

[1] 5 Rob., 402 (1803).
[2] *Ibid.*, 325 (1804).
[3] 6 Rob., 54 (1805).
[4] *Ibid.*, 9 (1805).

He expatiated on the ease with which vessels could go on forbidden voyages on the allegation of an innocent termination of their wanderings. Yet if captors are to be allowed to prove illegal terminations to apparently innocent voyages, there seems some injustice in refusing to claimants the same ready faculty of proving a redeeming innocent intention to take the character of illegality from a proved illegal voyage.[1]

In the "Essex,"[2] a United States ship, the vessel took on board a cargo at Barcelona, and was freighted for the Havana, but with instructions to touch at Salem, in America (where the owner resided, who adopted the plan and sent the vessel on), in order to break the continuity of the voyage. The vessel was captured, and the case eventually came before the Lords of Appeal.

"It appeared clearly to the Court," says Sir W. Scott, "that it was the intention, originating in the mind of an authorized agent, acting with full powers, that the vessel should go to the Havana, and that this purpose was adopted by the owner; that it was in reality a continued voyage from Spain to the Havana; that as to the intention, all doubt was done away by the adoption on the part of the owner, *who had the vessel in his own port*,[3] and was fully implicated in the engagement of sending her on, according to the projected voyage."

From the italicized words, it is plain that the vessel was not seized in the Atlantic, on the ground that she was going to Havana after touching at Salem; she had, when captured, been to Salem, and the only question was, whether she must be taken as having come from Salem or from Barcelona.

In the "Enoch,"[4] a charter-party conclusively proved the voyage to be one "to a colony of the enemy and back to America, and from thence to the mother-country in Europe." Sir W. Scott comments on these cases in the significant words:—

"It was not merely a circumstance; it was an absolute and conclusive fact, declaratory of the intention of sending on the cargo to Europe."

In the "Rowena,"[5] there was no such charter-party, but the ship was making for the final destination, and the question whether she must be taken to have come from an intermediate American port or a prior colonial one was thus left open to be decided by further evidence. This was found in her course of trading, and in the fact that the cargo had lain in America just long enough to be landed and reshipped.

[1] Cf. the "Trende Sostre."—"If the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of . . . proceeding with the contraband articles to a port of ulterior destination." —*Ibid.*, p. 390 (n.), (1807).

[2] 5 Rob., 369, *ex rel.* Scott; 402, *ex rel.* Grant (1805).

[3] Italics ours.

[4] 5 Rob., 370 (1805).

[5] *Ibid.*, 370 (1805).

In the "Maria,"[1] as in the "Polly," restitution was decreed. The voyage was one of a United States ship from New Providence (U.S.), to Amsterdam; a considerable portion of the cargo had come in the same ship from Havana, and together with some other goods of the same owner, and others taken on freight constituted the cargo at the time of capture. The vessel had stayed at the intermediate harbour nearly two months for repairs.

Sir W. Scott reviewed the above cases of the "Essex," "Enoch," and "Rowena," and observed:—

"There are no letters or writings, as in the 'Essex,' purporting an original intention to send on; there is no charter-party, as in the 'Enoch; there are no instructions disclosing a course of similar voyages to Amsterdam, as in the 'Rowena.'"

On these and on other grounds of distinction, Havana not being a colony of Holland, and the cargoes having been broken up at the intermediate port, he ultimately, after further proof, released ship and cargo, in spite of their having been taken in the very act of making for the colonial port, the ship and much of the cargo having come from the port of an allied enemy.

In the "Eliza and Katy,"[2] the capture took place during the concluding stage of the voyage, viz. as the ship proceeded from Philadelphia to Rotterdam. The alleged commencement of the voyage at an earlier stage was supported by the evidence of a member of the original crew, then in the British navy, and the Court expressed a strong opinion against the propriety of this evidence being adduced, and released the ship and cargo.

It is a somewhat important case, because an ulterior voyage *from* Rotterdam to Havana was contemplated, and considered quite immaterial.

"These are strong proofs," says Sir W. Scott, "of concerted fraud as to the ulterior voyage, on the part of the persons for whom the claim is given, but no objection has been raised against the present transaction, except as to the continuous voyage, on which it is said 'that some part of the cargo had been recently brought from Martinique, and that they were immediately transhipped and put on board this vessel. But that objection is answered by a paper on board. . . ."

In the "Maria"[3] (Monses) the goods were taken on board in the unblockaded Jahde. They had come in lighters from the blockaded Weser under a through charter-party, and the ship conveying them was captured, and would have been held good prize but for the operation of a special declaration of indulgence to Bremen commerce.

[1] 5 Rob., 365 (1805). [2] 6 Rob., 185 (1805). [3] *Ibid.*, 201 (1805).

So the "Charlotte Sophia."[1]

In the "Ebenezer"[2] the capture was made of a Prussian ship proceeding to Antwerp. The cargo was described as laden at Emden, whilst the witnesses deposed that it had been brought immediately there from Bordeaux, and not unladen but carried on within three days. The Court believed them, and condemned the cargo and restored the ship (thinking that the owner might not have known of the attempted voyage from Emden onwards). Sir W. Scott observes:—

"Very different is it from the case which has been cited, in which the ship had been lying three weeks at Emden. That material fact afforded time for new speculations, and rendered it equivocal at least, whether the ulterior voyage which was afterwards pursued did not spring from some change of intention which had taken place in the mind of the owner."

The "Sophie,"[3] like the "Ebenezer," was a case of a vessel captured going from Emden to Antwerp. It was said she had brought goods from some French island "on grounds of probability and suspicion," but she had spent five weeks at Emden, and the Court restored the cargo without further proof.

In the "William,"[4] as in the "Polly," Marblehead was the intermediate port; but the event was not so fortunate. Like the "Polly," she had on board at the time of capture cocoa, sugar, and salt fish. The cocoa she had brought herself from Venezuela, as the "Polly" had brought sugar from Havana. Inversely, the sugar had been brought from Havana in other ships, like the "Polly's" cocoa. Some repairs had been effected at Marblehead, the ship being unladen for the purpose, but only staying a week, though the crew and hands were paid off as on the conclusion of a voyage. Salt fish was shipped there, and the vessel left for Bilbao. Duty had been paid on the cocoa landed and reshipped, and (one infers) on the sugar. Ship and cargo were condemned at Halifax.

The Lords of Appeal admitted the claim for ship and cargo, except as regarded the cocoa. The remarkable point about the case is that no question seems to have been entertained that the sugar, although travelling from Havana to Spain, would not have been interfered with. The case as regards it, no less than the fish, was absolutely dismissed without any reasons being assigned. So far, therefore, as the "Thomyris" is of any authority on the normal law of close trade and continuous voyage, it is directly in conflict with the "William"—a decision of a superior tribunal.

As regards the cocoa, the claimants were called upon to prove that it was a real importation into Marblehead. They failed to do so.[5]

[1] 6 Rob., 204 n. (1806).
[2] *Ibid.*, 250 (1806).
[3] *Ibid.*, 251 n. (1805).
[4] 5 Rob., 385 (1806).
[5] Their evidence and that of the customs collector is set out at p. 391 of the report.

Sir William Grant said:—

"The question in this case is whether that part of the cargo which has been the subject of further proof, and which, *it is admitted*,[1] was at the time of the capture going to Spain, is to be condemned on coming directly from La Guayra within the meaning of His Majesty's instructions. According to our[2] understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with the colonies of our enemies during war a trade from which they were excluded in time of peace. . . . What the present claimants accordingly maintain is not that they could carry the produce of La Guayra directly to Spain, but that they were not so carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain.

"What, then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation [would prevent its being direct]. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned[3] changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again to the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Suppose the landing to be merely for the purpose of airing or drying the goods, would any one think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. . . . If the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law the means, however operose, which have been employed to cover a breach of it."

These strong expressions as to the paramount value of the truth, when discovered, were made in a case in which sugar, transhipped at Marblehead, was allowed to pass from Havana to

[1] Italics ours.

[2] The Lords of Appeals.

[3] He does not say "*to which the end* of a voyage is to be reckoned."

Spain without question or inquiry. It is obvious that Sir W. Grant was referring to the truth as established by admissible evidence in the regular course of prize procedure, and was not contemplating a roving inquisition into the intentions of vessels making for a lawful port.

He proceeds to examine the claimants' affidavit, and gives his reasons for considering it insufficient:—

"The claimants," he adds, "seem to have conceived that the inquiry to be made here was *not* whether the importation was real or pretended, but whether the pretence had assumed a particular form. . . . And it has, I understand, been said that our departure from that supposed rule in the case of the 'Essex' (Orne) was a surprise upon the merchants of America, who had by our former decisions been led to believe that proof of landing and payment of duties in America would in every case be held absolutely decisive of the character of the voyage."[1]

He quotes the cases above cited (the "Mercury," "Eagle," "Freeport," and "Essex") to rebut the imputation of surprise; and remarks that even a decision as to the conclusiveness of payment of duty would not exclude the captor from rejoining that the duties were balanced by drawbacks. In the result, the cocoa is declared good prize.

The "Thomyris"[2] is a decision not on continuous voyages generally, but on the interpretation of a particular Order in Council (that of 7 January, 1807) forbidding trade between the ports of France and those under her control. The peculiar feature of the voyage in question was that it was one from a safe port (Lisbon) to a French one. But certain barilla, part of the cargo, had come to Lisbon direct from a port under French control, and had merely been transhipped there. Now there are several cases of trading with the enemy, and others decided under British Navigation Acts, which must have been present to the mind of the Court, and which clearly lay down the principle that a traffic, illegal by municipal common law, or by the terms of municipal Navigation Acts, cannot be rendered legal by being carried on in different vessels during separate stages. Therefore, when the judge condemned the barilla, observing—"In all cases of this description it is a clear and settled principle that the mere transhipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country where the transhipment takes place"—he was probably thinking of these cases where, under municipal law, a State strikes at a

[1] They had some reason for thinking so; see the "Polly" (Lasky), *supra*, p. 262.
[2] 1 Edw., 17 (1808).

particular kind of injurious trade, however and by whatever circuitous stages carried on.

The Order in Council was designed to strike at French trade, by way of reprisals, in the same sweeping and quite extra-legal manner. The interpretation put upon it is of little value as a guide to the treatment of the legal and normal doctrine of continuous voyage. That doctrine concerned itself only with continuous voyages of one and the same ship (or of goods going under a through charter-party), as is obvious from the case of the "William."[1] In short, under the Order in Council, as under the Navigation Laws, it was the *traffic*, however carried out, that was threatened: under the International Law embodied in the "Rule of 1756," it was the un-neutral identification of a particular vessel with the enemy which was the cause of condemnation.

In any case, it is to be noted that the capture was made during the last stage of the barilla's transit, when it was certain that it was going to the unsafe port.

The "Baltic"[2] (1809) was a ship captured *en route* from Mauritius to Philadelphia. The ground of condemnation of ship and cargo was that the bulk of the cargo was enemy property, and that it was attempted to disguise the fact. The case is of no authority on the subject of continuous voyage; although the possibility that the voyage might be a continuous colonial one from Mauritius to Bordeaux is alluded to by the King's Advocate in argument, counsel for the owners do not think it necessary to deal with the suggestion in reply. The cargo had, in fact, been bought with the proceeds of contraband, and there was every reason to condemn it; and the ship for the fraud in representing it to be American.

The "John"[3] sailed from New Providence, in the British West Indies, for Havana with provisions and spirituous liquors which had been carried to the former port by the "Columbia" from Amsterdam, and by the "Nancy" from Trieste. She was captured, and on an appeal from the Vice-Admiralty Court of New Providence, the High Court of Appeals restored her, but without stating the reason. The principal argument was directed to the fact of the cargoes of the "Columbia" and "Nancy" having been incorporated into the general commerce of the intermediate port; and the case appears too clear for argument.

In the "Hope,"[4] the Court was asked to condemn certain tea and sugar taken in transit from the United States (probably New York) to Bordeaux, having previously come in the "Peace" from a French colony (probably Mauritius), on the ground of

[1] *Supra*, p. 267.
[2] 1 Acton, p. 25 (1809).
[3] *Ibid.*, 39 (1809).
[4] *Ibid.*, 43 (1809).

the continuity of the voyage. This ground would, if maintainable, have justified the confiscation of the ship and the whole cargo; and the Court preferred to rest its condemnation of the tea and sugar in question on the ground of their being enemy property.

The question of enemy property is indeed much complicated with that of continuous colonial voyages. (Cf. the "Mercury."[1])

"Die Jungfer Charlotta"[2] is a rather unusual example of a continuous voyage becoming such at its very end. She was a Papenburg ship, which sailed from St. Martin's for the Baltic with salt. Having put into Oporto in distress, where the salt was sold to a Portuguese, who freighted the ship with cork in addition, she was captured *en route* for Middleburg in Holland. The Court of Admiralty at London condemned the salt, restored the cork, and also released the ship. On appeal, the ship was condemned as good prize on account of participating in the prohibited trade between the French island of St. Martin's and the port of Middleburg, an ally of France.

This was not, however, precisely a case of continuous voyage as governed by the old principles applicable to colonial voyages, but one under the stringent Order in Council of 7 January, 1807, under which Britain attempted to stop all trade with France.

The question in such cases becomes simply one of the proper interpretation of an order confessedly extra-legal.

The "Patapsco"[3] was a United States ship captured when proceeding to Mauritius from Java with a miscellaneous cargo. The High Court of Appeals seems disposed to have held that trade between a Dutch colony and a French one (both hostile) was a close trade, and not permissible to neutrals. But they hesitated to hold that the ship was intended to discharge at Mauritius, her papers being for Baltimore, and restored ship and cargo, with costs to the captors.

The "Two Brothers"[4] is a case very like that of the "Patapsco,"[5] but it ended in the condemnation of the cargo and ship, the ostensible destination of the cargo to Tranquebar being disbelieved. These cases of the "Patapsco," "Richmond," and "Two Brothers" are inversions of the principle of continuous voyage: in them it is the owner who asserts that the voyage is continuous and the making for an intermediate port a mere incident.

The "Commercen"[6] has been much misunderstood by foreign writers, who do not clearly separate the topics of enemy property and contraband.[7] It was simply a case of a cargo, condemned as admittedly the property of the hostile British. As W. Beach

[1] 1 Acton, 66. [2] *Ibid.*, 171 (1809). [3] *Ibid.*, 270 (Grant), (1810).
[4] 2 Acton, 38 (1816). [5] *Supra.* [6] 1 Wheaton, 382 (1816).
[7] E.g. Calvo, who treats it as a parallel case to the "Springbok"]

Lawrence[1] points out, the sole question was whether or not the ship which carried them to neutral Bilbao was entitled to freight. In an ordinary case it would have been so entitled. But this was not a case of the carriage of a merchant's silks and wines, but of the carriage to a fleet and army of their Government's naval and military forage. Of course freight was denied.

Story, J., took occasion to observe, *obiter*, that if contraband goods were destined to a neutral port "for the direct and avowed use of the enemy's army or navy," he and the concurring judges[2] considered they would be confiscable. The word "direct" seems to import that the enemy's forces must be within the neutral territory; and the word "avowed" excludes all matters of suspicion or evidence. The illustration he gives clinches the interpretation: "Suppose in time of war a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, *avowedly* for the exclusive supply of such fleet?" Other incidental observations on contraband found their way into the head-note, and create the erroneous impression that the case is one of contraband.

The real interest of the case lay in the fact that the British troops in Spain were not fighting the United States troops, but those of France, with which Power the States were not even informally allied.

Some correspondence on an early case of condemnation of cargo as destined ultimately for a blockaded port, though the ship was bound for a safe one, arose out of the Brazilian blockade of Buenos Ayres. The United States brig "Pioneer" was bound to Montevideo; she was properly documented thither, and did not pass to the west of it. Admiral Guedes, therefore, did not consider her a lawful prize. "It is easy," he says, "to comprehend and believe that the vessel was under engagement to go to Buenos Ayres; but presumptions and indications still stronger do not determine me to act. Believing, therefore, that the brig 'Pioneer' intended to proceed with her cargo to Buenos Ayres, I . . . released her, because I had no legal evidence against her." The cargo, however, he did seize, because the supercargo was provided with two sets of papers—one for Buenos Ayres and one for Montevideo. "According to good faith," says the Admiral, "the papers ought to have been for Montevideo alone; and if upon arriving there the blockade should have been found not in vigour, another direction might have been given to the merchandise if convenient."

Again, in 1828, Lord Aberdeen correctly laid down the true

[1] Wheaton's "Elements," ed. Lawrence (1863), p, 810.
[2] Marshall, C.J., Livingston and Johnson, JJ., dissented.

principle.[1] Russia had blockaded the Dardanelles with a view of putting stress on Constantinople, and affected to consider trading with the northern coast of the Archipelago as a violation of the blockade. Lord Aberdeen observed: "It becomes my duty to point out to Prince Lieven the irregularity of this conduct, which, under the plea of enforcing the blockade of the Dardanelles, had imposed a new and extensive blockade, and had prohibited all access to ports hitherto open to the commerce of neutrals. It is sufficiently intelligible that the Russian Admiral, looking to the blockade of the Dardanelles as the means of preventing the arrival of provisions at Constantinople, should endeavour to increase the privations of that city, and should desire to render his measure more efficacious by its application to the several points along the coast from whence such provisions could be conveyed overland to the Turkish capital.

"But he should recollect that the traders of neutral States have no such interest; *that in directing their commerce to ports not actually under blockade*, they violate no law and are guilty of no offence; that the same reasoning which admits the extension of the blockade as proposed by Admiral Ricord, with the view of increasing the horrors of famine at Constantinople, would equally authorize the blockade of Salonica or of Smyrna."

The "Frau Houwina" (1855)[2] was a Hanoverian ship, taken by the French in transit from Lisbon to Hamburg with saltpetre, and condemned on suspicion of an ulterior destination of ship or cargo to Russia, during the Crimean war. The reasons were:—[3]

"(1) Que ce bâtiment avait en effet à bord 973 sacs de salpètre brut de l'Inde, désignés sur le manifeste et les connaissements sous la simple dénomination de marchandises.

"(2) Que les connaissements y relatifs, signés seulement du capitaine, indiquent que le chargement avait été fait par le Sieur Roiz à son ordre et à destination de Hambourg.

"(3) Que ces 973 sacs provenaient intégralement d'un chargement apporté d'Angleterre à Lisbonne le 17 Oct. dernier par le navire le 'Julius,' d'où ils avaient été transbordés sur la 'Frau-Houwina' par les soins du Sieur Schaltz, négotiant à Lisbonne, à qui ils avaient été consignées par connaissement au nom du Sieur Jean Esken, de Londres.

"(4) Que l'exportation d'Angleterre avait eu lieu au moyen de trois acquits-à-caution portant engagement d'en faire constater le débarquement dans le pays de destination, et que, pour remplir cet engagement, Schaltz avait obtenu du consul d'Angleterre à Lisbonne un certificat attestant, d'après sa déclaration, que ledit salpêtre était destiné à être consommé dans ce pays, et non à être ré-exporté. . . .

[1] Aberdeen to Heytesbury, 22 May, 1828 (*Ibid.*, Vol. XVII, 390).
[2] Calvo, sec. 2767.
[3] Numerals ours.

"(5) Au fond, considérant que le salpêtre est un objet susceptible d'être contrebande de guerre;

"(6) Que la contrebande de guerre est saisible sous pavillon neutre quand elle appartient à l'ennemi ou quand elle est dirigée vers le territoire, les armées ou les flottes de l'ennemi;

"(7) Que le commerce des objets de contrebande ne saurait être présumé licite qu'à le condition d'être effectué avec la plus entière bonne foi et la plus complète sincerité, et que toute dissimulation, toute fraude ou tout dol dont ce commerce serait accompagné doivent de plein droit le faire présumer illicite; et que c'est à ce commerce surtout qu'il importe d'appliquer avec rigueur le principe d'après lequel il y a lieu de considérer comme appartenant à l'ennemi les objets dont la propriété neutre ou amie n'est pas justifiée pas les pièces trouvées à bord;

"(8) [That allies are entitled to no specially favourable treatment in case of 'simulations évidemment destinées à tromper' their own or their allies' cruisers].

"(9) Que les prétendus usages commerciaux invoqués par les réclamants pour expliquer ces simulations ne sauraient s'appliquer en temps de guerre à des expéditions d'objets de contrebande de guerre.

"(10) Qu'ils ne peuvent non plus expliquer dans l'espèce la dissimulation de la nature de la marchandise sur le manifeste et les connaissements. . . .

"(11) Qu'à ces présomptions de propriété ennemie suffisantes pour déterminer la confiscation du salpêtre saisi, il faut encore ajouter celles qui se rattachent à la destination du bâtiment; qu'en effet, si la bâtiment a été rélâché comme neutre, il ne s'ensuit pas de plein droit que par la décision le conseil ait reconnu la réalité de la destination neutre assignée à sur voyage, puisque cette relaxation eût dû être prononcée également, aux termes de règlements françaises, dans le cas où le bâtiment aurait été destiné d'une manière patente pour un port ennemi;

"(12) Qu'il est d'autant plus permis de supposer que la destination de Hamburg n'était qu'apparente, et que la 'Frau-Houwina,' après avoir débarqué dans ce port son chargement licite, devait relever pour un port ennemi de le Baltique; que son départ de Lisbonne coincidait précisément avec le moment de la retraite des escadres alliées, qui laissaient les ports russes débloqués, et que cette dissimulation de plus sur les papiers de bord ne serait que la reproduction d'une fraude analogue, à l'aide de laquelle ce même bâtiment avait été précédemment expédiée de Lisbonne pour Elsineur par le même négotiant Schaltz avec un chargement destiné en realité pour la Russie.

"(13) Mais que, sans recourir même a cette supposition, l'expedition du navire pour Hambourg cachait, suivant toute apparence, sinon pour le navire, du moins pour le chargement, une destination ennemie, attendu qu'il est de notoriété publique que la ville de Hambourg a reçu dans le courant de l'année dernière des quantités de salpêtre, soit à l'état de nitrate de potasse, soit à l'état de nitrate de soude, qui excedait de beaucoup ses importations habituelles; qu'au mois de decembre dernier, à l'epoque même où le 'Frau-Houwina' pouvait être attendu à Hambourg, des tentatives étaient faites par des négociants de cette ville pour obtenir d'un armateur de Lubeck l'affrètement d'un bâtiment destiné à porter en

Russie du plomb, du salpêtre et du soufre, et qu'à la fin du mois de janvier suivant une autre expédition de plomb et de salpêtre, partie de Hambourg par chemin de fer à destination de Koenigsberg, a été de cette dernière ville dirigée par terre et par traîneaux russes vers la frontière de Russe, du côté de Kowno";

And in fine—

"(14) Qu'une expédition de contrebande de guerre préparée à l'aide d'une fraude contre les mesures politiques prescrits par un gouvernement allié dans l'intérêt d'une guerre commune, continuée sous un nom supposé, dissimulée sur les papiers de bord et faite à destination de parages rapprochés du pays ennemi et servant de voie habituelle aux approvisionnements de l'ennemi, doit être effectuée pour compte et à destination de l'ennemi, et qu'il y a lieu dès lors de prononcer la confiscation des objets saisis. . . ."

Because, therefore, there was a good market for saltpetre at Hamburg, in consequence of the Russian demand, a neutral ship's neutral cargo destined thither was condemned; and the most trivial matters, such as the want of detail in the manifest, and the variance from the original intention of taking the goods no further than Lisbon, were eagerly fastened on as the most glaring proofs of fraud. Calvo praises the luminous exposition of the judgment. It does indeed announce with an air of lucid finality various sweeping and disputable propositions of theory; but what can be thought of the clearness of a decision which confuses the topics of contraband and enemy property as they are confused in paragraph 6?

It is true that the Declaration of Paris of 1856 is open to the same charge of confusing these topics:—

"Le pavillon neutre couvre la marchandise ennemie, à l'exception de la contrebande de guerre."

Enemy goods cannot be contraband of war. The Declaration must mean "such articles as are capable of being contraband of war as between belligerent and neutral." But did it mean to limit the right to seize them to those cases in which neutral contraband could be captured? or did it allow noxious articles belonging to the enemy to be seized on the high seas wherever found, under the old rule as to the seizure of enemy goods? If it meant to assimilate them completely to neutral contraband, belligerents must be content to see their enemies' munitions of war going safely in neutral ships to neutral ports, unless they can establish that the ships are under the control and in the temporary service of the enemy Government. It is partly because the Declaration is not recognized as giving belligerents a right to capture enemy goods of contraband quality, everywhere, that we find attempts

made to break down the wholesome rule that the trade of neutral ports in neutral goods must be unaffected by the outbreak of war.

It has been thought worth while to set out the lengthy reasons of the Conseil des Prises in the "Frau-Houwina," in order that it may be seen how slender are the grounds on which goods may be held to be contraband by a belligerent who is entrusted with such liberty of supervising the commerce of neutrals.

Jecker v. *Montgomery*,[1] which Chase, C.J., confidently cites in the "Bermuda," was a simple case of trading with the enemy. A nation naturally has a right to prevent its own subjects from trading with the enemy, and to do this and to infer the trading, in any way and by any evidence it likes. In the present case, several authorities on trading with the enemy are cited, but not one on continuous voyage.

"Attempts," say the Court, "have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned, as having been taken in a course of commerce rendering them liable to confiscation; and it has been ruled that, without licence from Government, no communication, direct or indirect, can be carried on with the enemy; that the interposition of a prior port makes no difference; that all trade with the enemy is illegal, and the circumstance that the goods are to go first to a neutral port will not make it lawful,"

and citation is made of the "Indian Chief"[2] and the "Jonge Pieter."[3] Because any arbitrary steps can be taken in order to stop one's own subjects from hostile trading, it does not follow that the received rules limiting the search of foreign ships for contraband can be set aside so as to render them liable to the like treatment.

A very proper case of condemnation, and one strictly in analogy with the British authorities, was that of the "Gertrude."[4] The voyage was ostensibly to New Brunswick, and the ship was captured putting into Charleston with a Charleston pilot on board.

In the "Bermuda,"[5] the facts were these: The "Bermuda" was a steamship which had successfully run the blockade of Savannah towards the end of 1861 (the year of her launch at Stockton-on-Tees). The great Southern firm of Fraser, Trenholm & Co. then despatched her, early in 1862, from Liverpool to St. George's in Bermuda, where she remained about five weeks waiting for orders. The Supreme Court (U.S.) is puzzled to know why the cargo was not transhipped there for the Confederate

[1] 18 Howard (Supreme Court), 110 (Daniel, J.) (1855).
[2] 3 Rob., 22 (1800). [3] 4 *Ibid.*, 79 (1801).
[4] 5 Wall., 8 (1863). [5] 3 *Ibid.*, 514 (1865).

States. The owners state that it was the consignee who wished it sent to Nassau; but a letter from Messrs. John Fraser & Co., of Charleston, was produced, directing the person who was alleged to be the consignee to have the goods sent to the latter port. There was a swift steamboat of light draught, the "Herald" (an old Dublin mail-packet), which, on somewhat slight evidence, the Court considered to be held at Bermuda in readiness to take on the "Bermuda's" cargo if the latter ship did not proceed to the C.S.A. herself, thus affording some colour to the theory of a concerted plan. The "Bermuda" was taken *en route* from St. George's to Nassau; and the master destroyed certain papers, which of itself raised strong suspicions.

Three points were taken, and all decided in favour of the captors.

(1) The ship and cargo were held to be really the property of the Confederate firm, John Fraser & Co., and therefore enemy property. The point is not germane to our present subject; but it is relevant to remark (*a*) that the finding rendered any decision on the continuity of the voyage unnecessary; (*b*) that it was unsupported by the evidence, which was perfectly consistent with Fraser & Co. being the mere agents of the British firm of Fraser, Trenholm & Co.

(2) The ship was held liable for being engaged in an attempt to carry contraband to the Southern ports, whether she was actually going thither herself or not. Nominally admitting that "the description of cargo, if neutral, and in a neutral ship, and on a neutral voyage, cannot be inquired into in the Courts of a belligerent," Chase, C.J., shifts the ground of liability from the unmistakable evidence of course and papers to the shadowy suspicions of captors, by admitting an inquiry as to intention. "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, *if intended* for actual delivery at the port of destination and to become part of the common stock of the country or of the port." Once admitting this novel principle, the nature of part of the cargo was sufficiently patent. Nearly eighty tons of the cargo were cannon, guns, shells, and fuses; there were also considerable quantities of pistols, swords, and cartridges, and about 400 barrels of gunpowder.

Then as to the ulterior destination, the very fact that the cargo was of such a noxious nature was held sufficient to prove it. This (as Evarts notices) is tantamount, in the first place, to condemning goods on their contraband nature alone.

"It makes no difference," says the Court, "whether the destination to the rebel ports was ulterior or direct; nor could the question of destina-

tion be affected by transhipment at Nassau, if transhipment was intended, for that could not break the continuity of transportation of the cargo."

(It might not break it, but it made it impossible, by the Law of Nations, to prove it.)

"The interposition of a neutral port between neutral departures and belligerent destination has always been a favourite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transhipments intervene."

It might have been thought necessary that some proof of these confident statements should be afforded. None of these numerous cases of the favourite practice of blockade-runners and contraband traders are forthcoming from the recesses of the Chief Justice's information; and he only substantiates his position by a reference to the case of *Jecker* v. *Montgomery*,[1] which has nothing whatever to do with either blockade or contraband, and to the British cases on continuous colonial voyage, which he fails to notice rest on proved facts and not on plausible hypothesis. He proceeds, however:—

"If there be an intention, either formed at the time of original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port. There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship where several are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. . . . Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind and all necessary to the convenient passage of persons and property from one end to the other."

Arguments from analogy are a convenient mode of begging the question. A chain is no stronger than its weakest link; and when some of the links are invisible to the eye, it is hardly for a prize court, with its imperfect methods of appreciation, to declare positively that they exist. Nor is it safe to assert that a plank is a bridge because it is possible to see another plank reflected in the water.

The spoliation of papers was relied on as a ground of confiscation of the ship itself as a carrier of contraband, though a variety of other circumstances were also held capable of justifying it; among which was the very fact of the "deceptive" destination to

[1] 18 Howard, 114; *supra*, p. 276.

Bermuda. It seems, therefore (as in the "Frau-Houwina"), that the Court would have preferred contraband to be carried to the enemy direct, and that it would have been actually safer so to transport it. It was even hinted that the whole transaction was one behind which stood the Confederate Government, and that the ship was in its service.

(3) The Court held ship and cargo confiscable likewise on the ground of attempted breach of blockade.

"What has been already adduced of the evidence satisfies us completely that the original destination of the 'Bermuda' was to a blockaded port; or, if otherwise, to an intermediate port, with intent to send forward the cargo by transhipment into a vessel provided for the completion of the voyage."

The Court thus disregarded the catena of authorities which show that the intent to enter a blockaded port must be clear and unmistakable, and proved in practice from admissions by the master or else patent from the papers or the situation of the ship.

The schooner "Stephen Hart"[1] had a cargo of arms and munitions of war, and was taken *en route* from London to the Cuban port of Cardenas, and in a situation perfectly consistent with that course.[2] The curious statement of the case by Wallace runs: "The nominal destination of the vessel and cargo was Cardenas; but the preparatory proofs clearly established that this pretended destination was false." We are now prepared to learn that the schooner was not going to Cardenas at all, but to Baltimore or Charleston; but the reporter proceeds, "and that the entire lading was to be *there* transhipped, to be conveyed by a swifter vessel, or was to be carried on without transhipment to its belligerent destination."

It is impossible to think of Lord Stowell characterizing as "*false*" the destination to which a ship was admittedly going.

The "Springbok,"[3] unlike the "Bermuda," was a case decided almost entirely on the score of blockade-running. She was a barque, and it was highly improbable that she was intended to run the blockade herself. But on arrival at Nassau, it was supposed, her cargo was to be transferred to a light-draft steamer for conveyance to the Confederate sea-board. The papers were regular, and candidly dealt with.

The claimants took the point—one of the highest, and indeed of crucial, importance—that evidence beyond what was furnished by the ship's papers and the declarations emitted by her people (the "preparatory examination") was inadmissible, unless to con-

[1] 3 Wall., 559; cf. also 5 Wall., 7 (1865).
[2] 5 Wall., 1 (1866). [3] *Ibid.*, 1 (1866).

tradict "further proof" when allowed as an indulgence to the claimants. That is, all the circumstances of suspicion—previous conduct of consignees and owners, nature and quality of the cargo, private letters, and the like—must be swept aside, and the plain facts appearing from the papers and depositions alone looked at. If the plain facts were themselves ground *primâ facie* for condemnation, evidence of innocence might, as a concession, be allowed, and then rebutting evidence would be admissible to contradict it. But it was urged that it was never primarily looked at.

The District Court rejected this argument, which seems historically indisputable. Under the influence of common law ideas, it treated the case as though it were an ordinary mercantile one, in which its duty was to look at all the evidence procurable and to give a verdict on the balance of probabilities—instead of a quasi-criminal one, governed by a special procedure designed to afford extra safety to the accused.

The editor of the "Black Book of the Admiralty" remarks on the difficulty experienced by common lawyers in accommodating themselves to the peculiarities of Admiralty jurisdiction. "It will be by no means a light task for judges who have been trained up in the exclusive study of the principles of the English municipal law to accommodate themselves to a new standpoint of law . . . as judges in maritime cases," and he quotes a case where the Privy Council itself, presided over by a chief justice, had much difficulty in mastering the true conception of an indelible maritime lien.[1]

The Supreme Court, on appeal, thought that the argument was good, but that they could not go behind what the District Court had done in the way of admitting evidence. They released the ship, which had been condemned on slight circumstances tending to identify the owners with the design of importing the goods into the Confederacy. But they upheld the confiscation of the cargo. After gravely animadverting on the "misconduct" of the shippers in not stating the contents and consignees of certain packages on the bills of lading, but observing (as, of course, was the case) that such conduct did not warrant condemnation, the Court proceeded to "ascertain the real destination of the cargo."

The grounds which the Court then give for believing the cargo to have an ultimate belligerent destination amount to the following somewhat remarkable reasons:—

(1) All the cargo must have had the same destination.[2]

[1] "Black Book of the Admiralty," Vol. IV, CXXXII.

[2] "Nor can we doubt that the whole cargo had one destination."

(2) Some of it was specially fitted for the Confederate military service.[1]

(3) Some of it was well adapted for that service.[2]

(4) No sale was intended at Nassau, because "most likely" the goods would have been consigned to some established house there if it had been.

(5) The master was directed to take instructions at Nassau from the charterers' agent there.

(6) The shippers had sent goods to the Confederate authorities by indirect shipments before.

(7) *If these circumstances were insufficient* grounds for what the Court does not hesitate to style a "satisfactory" conclusion, another might be found in the presence of the "Gertrude" at Nassau ready to take the goods on. It seemed to the Court "extremely probable" that she had been sent to Nassau to await the arrival of the "Springbok."

The Court evidently did not appreciate the fact that it is not on interesting and "extremely probable" conjectures that neutral cargoes are to be condemned by nations; and condemned the whole cargo—tea, medicines, and ginger—as prize.

The "Peterhoff"[3] turned on contraband, as the "Springbok" mainly turned on blockade. The bills of lading were for delivery at the mouth of the Rio Grande (Mexico), for Matamoras, on the Mexican side of the river, which formed the frontier between Mexico and the C.S.A. It was urged that this was a breach of blockade, but the Court thought that the northern bank of the Rio Grande was not blockaded like the rest of the littoral of the Confederacy, and that the ultimate transit (if such was contemplated) of cargo from Matamoras across the river was a legitimate traffic. But on the point of contraband it found that an immediate destination for the Rio Grande and Matamoras would not protect the goods if it was found that they were "intended" for the Confederate States. Mexico, it may be stated, was at the time at war with France.

The "Peterhoff" (a slow screw-steamer) was taken on a proper course for the Rio Grande: at the time of capture, the master threw overboard a paper, said to contain a patent article belonging

[1] Two boxes of buttons which bore the initials C.S.N. In the same category of things *specially* fit for the Confederates, the Court included eight cavalry swords and eleven bayonets (British pattern) and about 500 gross of army buttons marked "A," "I," or "C." (The number of swords and bayonets is unaccountably exaggerated in the judgment to sixteen dozen and ten dozen respectively.)

[2] Army cloth and blankets.

[3] 5 Wall., 28 (1866).

to one of the passengers and supposed to be dangerous, and tore up some alleged private letters.

The District Court (S. New York) condemned vessel and cargo. The latter comprised artillery harness, "army" boots, "regulation" grey blankets, ninety-five casks of horseshoes, 52,000 horseshoe nails, a quantity of iron, steel, shovels, spades, blacksmiths' bellows and anvils, nails, leather; and drugs—calomel, morphine, chloroform, and quinine, with large varieties of ordinary goods.

The Supreme Court held that not even the cargo could be condemned (on the ground of breach of blockade) simply because it was meant to reach the Confederacy through a port which had perhaps by oversight been left unblockaded (Brownsville, opposite Matamoras), or by inland conveyance. But on the question of contraband it took up the surprising position that "the conveyance by belligerents to neutrals of contraband articles is always unlawful, and such articles may always be seized during transit by sea." This is a proposition which throws neutral commerce entirely at the mercy of a belligerent; it is a proposition entirely unheard of before the middle of the nineteenth century, and it derives no sanction from the practice of any maritime war.

Lord J. Russell was disposed to take the rulings of the U.S. Courts with some humility; but, invited by Lord Derby to say plainly whether he admitted that the trade of neutral ports was liable to such interferences, he explained that all he meant was that a *simulated* neutral destination could not protect a ship.

Eventually the matter was slurred over in the general arbitration and proceedings before the Mixed Commission. It must be noted that neither the "Peterhoff" nor the "Springbok" was confiscated; and the "Bermuda" was so closely identified with Confederate interests that morally, if not legally, the seizure was hardly to be regarded as an affront to Britain. The point of principle, however, remained open.

In *Hobbs* v. *Henning*[1] the English Court of Common Pleas had the opportunity of pronouncing on the legality of the "Peterhoff's" voyage. The action was on a valued policy of insurance on goods, and the defendants pleaded that the goods were contraband of war and shipped for importation into a belligerent port and liable to seizure as contraband, and also the fact of their condemnation by the District Court. Plaintiff pleaded that the ship was bound to Matamoras and not to a belligerent port; which defendants asserted was no answer to their above plea.

[1] 17 C.B.N.S. 791; Erle, Byles, and Keating (1864).

The Court rejected the defendant's plea.

"The allegation," said Erle, C.J., "that the goods were shipped for the purpose of being sent to an enemy's port is an allegation of a mental process only. We are not to assume therefrom either that the plaintiff had made any contract or provided any means for the further transmission of the enemy's goods into the enemy's State, or that the shipment to Matamoras was an unreal pretence. If the goods were in course of transmission, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy."

But that point was raised by a different plea; on the plea under discussion, a mere allegation of mental purpose was raised, which might be consistent with a *bona fide* importation of goods into Mexico as a commercial speculation, well knowing that they would be bought by a belligerent. The plea further alleged generally that the goods were seizable as contraband; but—

"The right of capture, according to Sir W. Scott's opinion expressed in the case of the 'Imina,'[1] attaches only when they are passing on the high seas to an enemy's port. . . . The liability therefore of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port."

Then as to the allegation that the ship did not sail on the voyage covered by the policy—which was also pleaded as matter of estoppel, on account of the decision of the United States Court—the judges[2] held the American decision to be no estoppel as to particular facts, and also that, if it could have been such, it did not decide that the ship did not sail on her insured voyage to Matamoras, but, on the contrary, it decided that she did. Judgment was given for the insured plaintiff.

[1] *Supra*, p. 261.

[2] Keating, J., expresses no opinion as to whether the finding of fact by a prize-court would operate as an estoppel.

CHAPTER IV

CARRIAGE OF PROPERTY AT SEA

ENEMY'S GOODS IN NEUTRAL SHIPS—NEUTRAL GOODS IN ENEMY'S SHIPS

A NEUTRAL flag covers enemy's goods except contraband of war: Neutral goods, except contraband of war, are not liable to seizure under the enemy's flag.[1]

Although these propositions contained in the Declaration of Paris, 1856, are to-day generally recognized in practice, they are not yet of universal acceptance, and therefore not enforceable upon all nations.

The States possessing a coast which up to the present have withheld a formal adherence, are the United States, Spain, Mexico, and Venezuela.

The first named, however, at the commencement of the Civil War, and again in the Spanish-American War, declared their adherence for the duration only of hostilities, and Spain, whilst repudiating her obligation to the Declaration of Paris, responded in the latter case by taking a similar course.

Under such circumstances, then, it is still necessary to state the opposing doctrines, and to examine the principles upon which they are based.

The Competing Rules.

(1) Enemy's goods may be captured even on board neutral ships, and neutral goods are free on board enemy's ships.

This doctrine was embodied in the *Consolato del mare*, and was universally accepted in Western Europe during the Middle Ages. It was based upon the principle:

That the quality of the goods should be determined by the character of the owner.

In the sixteenth century France not only seized enemy's goods in neutral ships, but the ships as well, and it was not till 1744 that neutral vessels carrying enemy's goods were freed from confiscation. In 1778 this practice was altogether abandoned, and France became the advocate of the opposing doctrine, "Free

[1] Hertslet, "Treaties," X, p. 547.

ships, free goods." In the war with England, however, in 1793, the temptation was too strong, and three months had scarcely passed before she reverted to her former practice, with the exception that the neutral ship was released and freight paid by the captors.

On the other hand, France stands almost alone in consistently upholding the maxim, "Enemy's ships, enemy's goods." This principle that the goods of a neutral friend laden on board an enemy's ship were good and lawful prize was incorporated in the ordinances of 1538, 1543, and 1584. The declaration of 1650 formed an exception, but the former practice was revived in 1681. From this period France generally adhered in her ordinances and in her treaties to this principle, sometimes in conjunction with the principle, "Free ships, free goods," sometimes without it.

Spain pursued a similar policy. In 1780, however, she too abandoned the principle of "Enemy's ships, enemy's goods," and exempted not only enemy's goods in neutral vessels, but the vessels as well.

So far as the recognition of the old rule was concerned, there was no change in English policy, either in theory or practice, apart from some treaty, until the Crimea War. How far that part of the rule which allowed the confiscation of the neutral ship laden with enemy's goods was followed in early times it is impossible to say. It was, however, asserted in 1640, on the authority of Sir Henry Martin, that it had never been the practice to condemn neutral ships for having enemy's goods on board. On the contrary, that the freight of such goods had always been paid.[1]

In the case of the "Pearl," in 1704, although the cargo was condemned as enemy's goods, freight was ordered to be paid.

The celebrated answer[2] in 1753 to the Prussian memorial contains a list of Prussian cases, amongst which a class is described as "ships restored with freight according to the bills of lading for such goods, which were found to be the property of enemy and condemned as prize."

"It was the invariable practice," says Sir Sherston Baker, "of the British Court of Admiralty during the wars of 1801 to restore the vessel, unless in cases where some circumstances of *mala fides* occurred, or where the ship was adjudged to have drawn on herself the loss of freight—as a penalty for some act which, though a departure from pure neutral conduct, has not, according to the practice of the law of nations, made her liable to condemnation."[3]

[1] Sydney, State Papers, Vol. XXI, 662.

[2] Printed in the "Collectanea Juridica." Described as one of the ablest expositions of International Law ever embodied in a State Paper.

[3] Halleck's "International Law," Vol. II, 309.

England, therefore, continued the old practice of seizing enemy's goods on board neutral ships whilst releasing the vessel upon payment of freight.

Upon the question of the carriage of neutral goods in enemy's ships, Great Britain appears in the early part of the nineteenth century to have wavered in her application of this part of the doctrine of the *Consolato del mare*. But this was only temporary, and, apart from treaties, Great Britain continued up to the Declaration of Paris to maintain the rule of International Law in her municipal code that neutral goods in enemy's ships were free.

The First Armed Neutrality was, as we shall presently see, silent upon this point, since it was useless to ask for what Great Britain already gave voluntarily.

This rule was, however, very considerably modified in practice by the application of a conflicting doctrine embodied in the rule, (2) Free ships, free goods; enemy's ships, enemy's goods.

This rule is based upon the principle:

That the quality of the goods should be determined by the character of the carrier.

The earliest recorded deviation from the Common Law rule is to be found in a treaty between France and the Porte in 1604, whereby French goods on board the ships of the Porte's enemies were to be restored to the owner, and goods on board French ships belonging to the Porte's enemies were not liable to seizure.[1]

It was not, however, till 1650 that the application of this principle formed the subject of agreement between Christian Powers.

The United Provinces.—The Dutch at this period may be fairly styled the carriers of the world, and it was to their obvious interest to obtain the immunity of goods carried in neutral bottoms.

In that year they concluded a treaty with Spain whereby it was agreed that the goods of the enemies of either party should be free from capture when on board the ships of the other party provided the latter were neutral.[2]

This policy was continued and embodied in treaties having similar objects with Portugal in 1661, France in 1661 and 1662, England in 1667, Sweden in 1667, England in 1674, Sweden in 1675, France in 1678, Sweden in 1679, England in 1689, and France in 1697.

France.—In addition to her treaty with the Porte, France gradually followed the example of the Dutch. In 1646 she had

[1] Dumont, V, xi, 40. [2] *Ibid.*, VI, i, 571.

concluded a treaty with the United Provinces for four years, exempting Dutch ships and neutral cargoes from confiscation, declaring that "their ships should free their cargo, notwithstanding the presence in it of merchandise and even of grain and vegetables belonging to enemies, excepting always articles contraband of war."[1] The same construction must, says Manning, be placed upon the treaty with the Hanse Towns in 1655, by which for fifteen years the Hanse flag covered the cargo, and the goods of Hanse subjects, if neutral, were restored if seized on board the ships of the enemies of France.[2]

By the Treaty of the Pyrenees, in 1659, the rule, "Free ships, free goods; enemy's ships, enemy's goods," was agreed to by France and Spain.[3] This rule was included in treaties with Denmark in 1662 and 1663, United Provinces in 1662, Portugal in 1667, Spain in 1668, Sweden in 1672, England in 1677, United Provinces in 1678, United Provinces in 1697. In the eighteenth century this principle was embodied in the Treaty of Utrecht, 1713, with England and the United Provinces.

In her treaty with the Hanse Towns in 1716, the old rule by which "*la robe ennemie*" confiscated both the ship and the goods was annulled, and the Hanseatic ships carrying enemies' goods were declared to be free, the goods only being seized and confiscated.[4]

The new principle "Free ships, free goods; enemies' ships, enemies' goods" was renewed by the treaty of 1739 with the United Provinces,[5] in 1742 with Denmark,[6] in 1748 with England and Spain by the Treaty of Aix-la-Chapelle, and in 1763 with the same Powers by the Treaty of Paris,[7] in 1774 with Mecklenbourg-Schwerin,[8] in 1778 with the United States of America,[9] in 1783 with England and Spain,[10] in 1785 with the United Provinces,[11] in 1786 with England,[12] in 1787 with Russia,[13] and in 1789 with Hamburg.[14]

In spite of this long advocacy the temptation of war was, as we have seen, too strong, and France in 1793 reverted to the old rule and declared enemy's goods on neutral vessels to be lawful prize, the neutral ship, however, being released and freight paid by the captors.[15] This policy was again enforced in 1797 by a similar declaration.[16]

[1] This treaty expired in 1650, when the French Commissioners repudiated the principle of "Free ships, free goods." Walker's "International Law," 298.
[2] Manning, 317. [3] Dumont, VI, XI, 267. [4] *Ibid.*, VIII, I, 431.
[5] Wenck, "Codex Juris Gentium" I, 424. [6] *Ibid.*, 621.
[7] Wheaton's "Hist. of Law of Nations," 120–5. [8] *Ibid.*, II, 709.
[9] De Martens, "Rec.," I, 39. [10] *Ibid.*, III, 439. [11] *Ibid.*, IV, 68.
[12] *Ibid.*, IV, 168. [13] *Ibid.*, IV, 210. [14] *Ibid.*, IV, 426.
[15] *Ibid.*, V, 382. [16] *Ibid.*, V, 393.

With the nineteenth century France returned to the new principle, and in the treaty of 1800 with the United States once more agreed to the rule, "Free ships, free goods; enemy's ships, enemy's goods." After the peace of 1815, the following treaties embodying the rule were concluded: with Venezuela in 1843, with Ecuador in 1843, with New Grenada in 1844, with Chile in 1846, and with Guatemala in 1848.

In the alliance with England against Russia in 1854, had each country adhered to its own policy neutral trade would have been rendered impossible. Working rules were thereupon temporarily enforced by the allied Powers, which ultimately were embodied in the Declaration of Paris, 1856. Thus by a joint declaration, the two Powers in April, 1854, agreed to waive their rights of seizing enemy's property laden on board a neutral vessel unless it were contraband of war, and confiscating neutral property, not being contraband of war, found on board an enemy's ship.

Spain.—As we have already seen, Spain adopted the new rule in her treaty with the United Provinces in 1650. This was followed by treaties embodying the same rule with France in 1659, with England in 1667, and again with France in 1668, whilst in her treaty with England in 1670, the old rule was left untouched.

In the eighteenth century, by the Treaty of Utrecht, 1713, the new rule was renewed with England. The treaty of 1650 was, in 1714, confirmed with the United Provinces, and the same principle was embodied in the Treaty of Vienna, 1725, with the Empire. Apart from these treaties, however, Spain had followed the more severe French practice, based upon the principle "*que la robe ennemie confisque celle d'un ami*," and it was not till 1780 that her national laws exempted from capture enemy's goods on neutral vessels and allowed the vessels themselves to go free and the freight paid on the goods taken out.[1] In the same year Spain, in conjunction with France—then both belligerents—warmly approved of the principles put forward by the Powers, which adhered to the First Armed Neutrality, viz. the immunity of belligerent cargoes in neutral vessels, contained in the following articles:—

"1. That neutral ships might freely trade from port to port and upon the coasts of nations at war.

"2. That the property of the subjects of belligerent Powers should be free on board neutral ships excepting goods that were contraband."

This was the principle of "Free ships, free goods," without the converse "Enemy's ships, enemy's goods." This declaration of

[1] De Martens, "Rec.," III, 98.

neutrality issued by Russia was also acceded to by the United States as belligerents, and by Denmark, Sweden, Prussia, Holland, Portugal, and Naples as neutrals.

By the Treaty of Versailles, 1783, with England and France, Spain once more revived and confirmed the new rule; but ten years later, upon the outbreak of the revolutionary war with France, she agreed with Great Britain, Russia, Prussia, and the Empire that the contracting Powers would unite all their efforts to prevent neutrals (especially Denmark and Sweden)

"from giving on this occasion of common concern to every civilized State, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French on the sea or in the ports of France."[1]

But in the treaty with the United States in 1795, Spain declared cargoes in neutral ships to be free, "no distinction being made as to who were the proprietors of the merchandises laden thereon."[2]

And lastly, although, as already stated, Spain in her struggle with the United States acceded to the provisions of the Treaty of Paris for the duration of hostilities, she has declined to make them or the new rule "Free ships, free goods," and its converse, part of her municipal code.

Russia.—The conduct of Russia in relation to the new rule has been uniformly inconsistent. "As long as she was herself neutral," says Manning, "she employed all her weight to enlarge the profits of neutrality; but she no sooner became belligerent than she pressed with unusual severity upon the commerce of neutrals." Her recent attitude in the Russian-Japanese war would appear to endorse these words, and to prove that since they were written Russia has not altered her sentiments or her habitual characteristics. The first treaty embodying the new rule was concluded with the United Provinces in 1715,[3] but in the treaty of commerce with England in 1734[4] no alteration in the old rule occurs. The First Armed Neutrality of 1780 has already been mentioned. It owed its origin to the instigation of Russia, and maintained the doctrine of "Free ships, free goods," without the converse "Enemy's ships, enemy's goods." This movement was especially directed against Great Britain, who, owing to her weakness after the American War of Independence, was unable to vindicate her objections beyond formal protests. Moreover, some of the Powers violated the provisions by which they were bound on the first opportunity. In the war between

[1] De Martens, "Rec.," V, 409, 440.
[2] *Ibid.*, VI, 154.
[3] Dumont, VIII, I, 431.
[4] *Ibid.*, II, II, 495.

Sweden and Russia in 1788, Gustavus III renounced the principles of the Armed Neutrality, and Russia followed suit, although not with the same frankness.[1]

In the treaty of commerce with Denmark in 1782, the principles of the Armed Neutrality were embodied,[2] but in the treaty with the Porte in 1783, it was agreed that Russian goods on board the ship of an enemy should not be confiscated nor the merchants enslaved, if there on peaceful business. This was in accordance with the old rule. It was renewed by the Treaty of Jassy in 1792.[3] In the treaties with Austria in 1785, and with France, the Two Sicilies, and Portugal the engagements of the Armed Neutrality were renewed.[4]

Upon the outbreak of the French revolutionary wars in 1793, the new principles were universally discarded. Russia had already repudiated her treaty with France of 1787,[5] and she became the leader of the combination against the French shipping trade and the chief instigator of the unusual severities exercised against neutrals.

In 1793 she renewed with Great Britain her treaty of 1766, which stipulated that neutral commerce should be carried on "according to the principles and rules of the Law of Nations generally recognized,"[6] and on the same day she concluded another treaty with the same Power engaging that the contracting Powers would unite all their efforts to prevent neutrals

"from giving on this occasion of common concern to every civilized State, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French on the sea or in the ports of France."[7]

In her treaty with Great Britain in 1797 no alteration was made in the old rule; the article dealing with neutral commerce was silent on the question.[8] But in her treaty with Portugal, in 1798, the new rule "that free ships made free goods, and neutral goods in an enemy's ship should be confiscated," appeared.[9]

By the Second Armed Neutrality of 1800, which owed its circulation to Russia, an attempt was made to force upon Great Britain the recognition of the new rule. The principles declared to be established by her treaties with Sweden,[10] Denmark,[11] and Prussia[12] were as follows:—

"1. That any vessel may freely sail from port to port and on the coasts of nations at war.

[1] Manning, 336. [2] De Martens, "Rec.," III, 474.
[3] *Ibid.*, III, 635, and V, 293. [4] *Ibid.*, IV, 76, 210, 236, 327.
[5] *Ibid.*, V, 409. [6] *Ibid.*, 432.
[7] *Ibid.*, 440. [8] *Ibid.*, VI, 362. [9] *Ibid.*, 550.
[10] *Ibid.*, VII, 172. [11] *Ibid.*, 181. [12] *Ibid.*, 188.

"2. That property belonging to the subjects of belligerent Powers shall be free on board the ships of neutrals excepting goods that are contraband."

This confederacy was of short duration. The battle of Copenhagen and the assassination of the Emperor Paul brought it to the ground. By the treaty with Great Britain in 1801, Russia returned to the old rule that neutral ships should not protect enemy's goods, and that goods in neutral ships should be free, excepting contraband of war and the property of enemies. Similar treaties were subsequently made with Sweden and Denmark,[1] but meanwhile Russia had concluded with the former Power a treaty embodying the principles of the Second Armed Neutrality.[2]

In 1807, however, the treaty of 1801 with Great Britain was repudiated, Russia proclaiming afresh the principles of the Second Armed Neutrality, and declaring that she would never depart from them;[3] but in spite of these professions, by her Ukase of August, 1809, she declared that—

"Ships laden in part with goods of the manufacture or produce of hostile countries should be stopped, and such merchandise confiscated and sold by auction for the profit of the Crown. And if the merchandise aforesaid composed more than half the cargo, not only the cargo, but also the ship should be confiscated."[4]

By a treaty between Russia and the United States of 22 July, 1854, it was agreed that free ships should make free goods, and that neutral goods on enemy's vessels should not be subject to confiscation, provided in either case the goods were not contraband.[5]

United States of America.—In spite of numerous treaties in the contrary sense, the United States have never swerved from the English view of International Law as the common law of nations.

"Although," says Wheaton, "by the general usage of nations independently of treaty stipulations, the goods of an enemy found on board the ships of a friend are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius[6] has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party.

[1] De Martens, "Rec.," VII, 260–281.
[2] *Ibid.*, 329.
[3] Ortolan, "Dip. de la Mer," II, 156.
[4] De Martens, "Supp." V, 485.
[5] State Papers, Vol. XLV, p. 125.
[6] "Res hostium navibus presumuntur esse hostium, donec contrarium probetur." "De Jure Belli ac Pac.," lib. III, c. 6, s. 6.

But however unreasonable and unjust this maxim may be, it has been incorporated into the prize codes of certain nations and enforced by them at different periods."

Valin and Pothier endeavour to support this maxim by declaring that those who put their goods on board an enemy's vessels, thereby favour the commerce of the enemy and share the character of the vessel. In so acting, adds Pothier, they contravene the law which interdicts to them all commercial intercourse with the enemy.

"The fallacy of this argument," says Wheaton, "consists in assuming what requires to be proved, that by the act of lading his goods on board an enemy's vessel, the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are thus liable *ex delicto* unless it be first proved that the act of lading them on board is an offence against the law of nations. It is therefore with reason that Bynkershoek concludes that this rule where merely established by the prize ordinances of a belligerent power, cannot be defended on sound principles. When, indeed, it is made by special compact, the equivalent for the converse maxim that *free ships make free goods*, this relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral that *enemy ships should make enemy goods*. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial inquiries into the proprietary interest in the ship and cargo, by resolving them into the mere question of the national character of the ship."[1]

"The rule," said Chief Justice Marshall, in the "Nereide,"[2] "that the goods of an enemy found in the vessel of a friend are prize of war and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the proposition that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found."

And the learned judge, in pointing out how this simple principle has been varied by treaty, showed how the two new maxims so far from being inseparable, were, in fact, entirely separate and distinct. For instance, the parties to the Armed Neutrality contended for the maxim that free ships should make free goods, but

[1] Lawrence's "Wheaton," 738.
[2] 9 Cranch, p. 418–9 (1815).

not for the converse. Indeed, so far were they from supposing the one to be a corollary of the other, that the contrary opinion was openly and distinctly avowed. The King of Prussia declared his expectation that in the future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in any enemy's bottom. Again, in the "Atalanta,"[1] Chief Justice Marshall said:—

"It is unnecessary to repeat the reasoning on which the 'Nereide' was decided. The opinion then given by the three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be and probably will be changed, or so impaired as to have no object to which it is applicable; but so long as the principle shall be acknowledged, this Court must reject constructions which render it totally inoperative."

The same principle was accepted in the "Amiable Isabella."[2] It was said in the "London Packet"[3] by Livingston J.:—

"It is not denied that a neutral may use the vessel of a belligerent for the transportation of his goods, and whatever presumption may arise from the circumstance, that it is not of itself a cause of condemnation."

Although this principle has always been recognized by the United States as a subsisting right under the law of nations, the Government has consistently endeavoured to introduce the new rule "Free ships, free goods" into their treaties, and advocated its adoption as a rule of international jurisprudence. But it has never treated the two maxims as inseparable. On the contrary, in some treaties it has stipulated for one only, in some for both, in some that neutral bottoms should make neutral goods, and that friendly goods should be safe in an enemy's bottom.

Thus the United States were amongst the Powers which acceded to the principles of the First Armed Neutrality of 1780, their prize courts having previously during the War of Independence acted upon the rule of International Law that enemy's property in neutral ships was liable to confiscation, whilst neutral property in enemy's ships was exempt. With some exceptions, e.g. in the treaty with France in 1778,[4] which stipulated for the new rule "Free ships, free goods" and its converse, the United States have invariably opposed the principle of "Enemy's ships, enemy's goods."

By the treaty with the Netherlands of 1782[5] the principle of "Free ships, free goods" except contraband of war, and "Enemy's ships, enemy's goods" was adopted, and similar provisions were

[1] 3 Wheaton, p. 415 (1818).
[2] 6 Wheaton, 1 (1821).
[3] 5 Wheaton, p. 137 (1820).
[4] Statutes at Large, U.S., Vol. VIII, 20.
[5] *Ibid.*, 38.

included in the treaty with Sweden in 1783.[1] But the treaty of 1785 with Prussia, whilst stipulating for the rule "Free ships, free goods," did not provide for the converse "Enemy's ships, enemy's goods." In 1799 the new rule was renewed by the treaty of that year,[2] which declared that the principle "Free ships make free goods" had not been sufficiently respected during the last two wars, and bound the contracting parties to use their best endeavours to obtain a rule of universal acceptance, so as to consolidate the liberty and safety of neutral navigation and commerce in future wars, and meanwhile, if either should be involved in war, to observe the principles and rules of International Law. This treaty was again renewed in 1828[3] with similar declarations of intention to obtain

"further provisions to ensure just protection and freedom to neutral navigation and commerce, and which might at the same time advance the cause of civilization and humanity."

Meanwhile, the Government had concluded treaties embodying the new rule "Free ships, free goods," but that neutral goods found on enemy's ships should be exempt and restored to the owners, with Morocco in 1787,[4] with Tripoli in 1796, and with Tunis in 1797.[5]

But in their treaty with Great Britain in 1795[6] it was agreed that the property of enemies on neutral ships should be confiscated, the ship and the remainder of the cargo being allowed to proceed; whilst in their treaty with Spain of the same year[7] it was declared that cargoes in neutral ships were to go free, "no distinction being made as to who are the proprietors of the merchandises laden thereon."

In the treaty with France of 1800,[8] the principle of "Free ships, free goods," contraband of war excepted, was combined with the principle of "Enemy's ships, enemy's goods." In 1816[9] in the treaty with Sweden and in 1819[10] in the treaty with Spain, it was declared that with respect to the fifteenth article of the treaty of 1795, which stipulated that the flag covered the cargo, the contracting parties agreed that this should be so understood with respect to those who recognized this principle; but if either of the parties should be at war with a third party and the other neutral, the flag of the neutral should cover the property of enemies whose Governments acknowledged this principle and not of others.

The principles of "Free ships, free goods" and "Enemy's ships, enemy's goods," were combined in the following treaties,

[1] Statutes at Large, U.S., Vol. VIII, x. 68.
[2] *Ibid.*, 168.
[3] *Ibid.*, 384.
[4] *Ibid.*, 101.
[5] *Ibid.*, 157.
[6] De Martens, "Rec.," V, 672.
[7] *Ibid.*, VI, 154.
[8] *Ibid.*, 186.
[9] *Ibid.*, 240.
[10] *Ibid.*, 262.

viz.: with Columbia in 1824,[1] with Central America in 1825,[2] with Brazil in 1828,[3] with Mexico in 1831,[4] with Chile in 1832,[5] with Venezuela in 1836,[6] with Peru-Bolivia in 1836,[7] with Ecuador in 1839,[8] with New Grenada in 1846,[9] with Guatemala in 1849,[10] with Peru in 1851,[11] and with San Salvador in 1850.[12]

In the treaty with Russia of 1854,[13] whilst the principle of "Free ships, free goods" was recognized, neutral property in enemy's ships, unless contraband of war, was declared not to be subject to confiscation. The contracting parties further agreed to apply these principles to the commerce and navigation of all such Powers and States as should consent to adopt them on their part as permanent and immutable.

These stipulations were repeated in the treaty with the Two Sicilies in 1855,[14] and with Peru in 1856.[15] In the treaty with China of 1858[16] it was stipulated that in case the latter Power should be at war with any other nation, the vessels of the United States should be free to continue to trade with the belligerent ports, provided their flag was not used to cover the transport of officers or soldiers in the enemy's service, nor to enable enemy's ships with their cargo to enter Chinese ports.

In the treaty with Bolivia in 1858,[17] the principles of "Free ships, free goods" and "Enemy's ships, enemy's goods" were recognized, with the further stipulation that those on board a neutral ship, although enemies, were not to be taken out unless they were officers or soldiers and in the actual service of the enemy.

The treaty with Venezuela in 1860[18] contains the stipulation that "Free ships shall make free goods," except contraband of war, but is silent as to the converse, "Enemy's ships, enemy's goods."

In the treaty with Hayti in 1864,[19] however, the stipulations of the treaty with Bolivia are repeated. So, too, in the treaties with the Dominican Republic in 1867,[20] and with the Republics of Peru and San Salvador of 1870.[21]

In the treaty with Italy in 1871,[22] the principle of "Free ships, free goods" was recognized, but it was stipulated that the flag of the neutral should cover the property of those enemies who acknowledged this principle.

In the treaty with Peru in 1887,[23] the former stipulation of

[1] De Martens, "Rec.," V, 310. [2] *Ibid.*, 328. [3] *Ibid.*, 393. [4] *Ibid.*, 418.
[5] *Ibid.*, 436. [6] *Ibid.*, 472. [7] *Ibid.*, 490. [8] *Ibid.*, 540.
[9] *Ibid.*, Vol. IX, 888. [10] *Ibid.*, Vol. X, 7. [11] *Ibid.*, 38. [12] *Ibid.*, 74.
[13] *Ibid.*, 215. [14] *Ibid.*, Vol. XI, 608. [15] *Ibid.*, 696.
[16] *Ibid.*, Vol. XII, 77, repeated in 1858, p. 183. [17] *Ibid.*, 300. [18] *Ibid.*, 215.
[19] *Ibid.*, Vol. XIII, 719. [20] *Ibid.*, Vol. XV, 481.
[21] *Ibid.*, Vol. XVIII, pp. 707, 732. [22] *Ibid.*, Vol. XVII, 853.
[23] *Ibid.*, Vol. XXV, 1452.

"Enemy's ships, enemy's goods" was reversed, and it was agreed that the flag of the neutral should cover the property of those enemies who acknowledged this principle.

Great Britain.—The Treaty of Westminster with Portugal of 1654 was the first instance in the history of Great Britain of applying the new rule that the flag should cover the cargo. This treaty was renewed in 1661, and again in 1703, and remained in force till 1810, when it was abandoned by the Treaty of Rio Janeiro.

But in our treaties with the United Provinces, Sweden, Denmark of the same year, with the United Provinces and Brandenburgh in 1655, and with the United Provinces in 1662, no alteration with the old rule was made.

Again, by the treaty with Sweden in 1661, the new rule was expressly excluded, and the treaties with Brandenburg and Denmark of the same year left the old rule unaltered. Neither was any alteration made in the treaty of 1662 with the United Provinces.[1]

In 1667 the new rule was included in the treaty with Spain,[2] and from that time to 1796 thirteen treaties were concluded with that Power, in each of which, with the exception of that of 1670, which was silent on the point, there was an article recognizing the new rule. All those treaties, and particularly the Treaty of Utrecht, which had provided in the fullest manner for the rule "Free ships, free goods" and its converse, were by the Treaty of Madrid, 1814, expressly ratified and confirmed, and, since Spain has refused to accede to the Treaty of Paris, form the rule by which our present relations with that Power must be governed.

It was in the same year of 1667 that the new rule was embodied in the Treaty of St. Germain-en-Laye with France. From that year till 1793 eight treaties were concluded with this Power, in every one of which, except that of Ryswick, there was an article either expressly recognizing the rule that the flag covers the cargo, or renewing the provisions of the Treaty of Utrecht.

But in the treaty with Denmark on the same day of the same year, 1667, no alteration was made in the old rule, and in the treaty of 1670 with the same Power, express provision is made to prevent the goods of enemies from being screened from capture.

In the treaty with Savoy in 1668, no alteration in the old rule is made.

By the treaties with the United Provinces in 1654 and 1662, no alteration was made, but by the Treaty of Breda,[2] 1667, the new rule was introduced for the first time. This was renewed by

[1] Dumont, VI, II, 423. [2] *Ibid*, VII, I, 27.

the treaties of 1668,[1] 1674,[2] and 1689.[3] By the Treaty of Utrecht the principle was once more affirmed and recognized in the fullest manner.

Up to the peace of 1815, Great Britain may be said to have halted between two opinions. But although she had by numerous engagements departed in practice from the established Law of Nations, she still held the old rule to be the law. Thus from the date of the Napoleonic wars, when her maritime power became assured, she entered into no more similar engagements, and, till the Crimean War, continued to declare the Law of Nations to be—

1. That a belligerent may take enemy's goods from neutral custody on the high seas.

2. That the carriage of enemy's goods by neutral ships is no offence by law, and consequently not only does not involve the neutral ship in penalty, but entitles it to its freight from its captors as a condition precedent to any interference with it on the high seas.[4]

To the question whether, in the event of war between Great Britain and Russia in 1854, *bona fide* British property, the produce of Russia, would be privileged from seizure, if shipped in neutral vessels, the Earl of Clarendon replied that such property, if exported from Russia by and on account of British merchants domiciled and trading there, although purchased before the war and exported to England, would not be respected by British cruisers unless in pursuance of a licence or of some special instructions to the officers of the navy.

"By the law and practice of nations," he added, "a belligerent has a right to consider as enemies all persons who reside in a hostile country or who maintain commercial establishments therein; whether such persons be by birth neutrals, allies, enemies, or fellow-subjects; the property of such persons exported from such country is therefore *res hostium*, and, as such, lawful prize of war. Such property will be condemned as prize, although its owner may be a native-born subject of the captor's country, and although it may be *in transitu* to that country; and its being laden on board a neutral ship will not protect the property."

Thus, in 1854, Great Britain and France held diametrically opposite views. The latter Power respected enemy's goods in neutral bottoms, and confiscated neutral goods on board enemy's ships; whilst the former confiscated enemy's goods on neutral ships, and respected neutral goods on enemy's ships. The situation was an impossible one for neutrals. Between the two theories there would have been no loophole of escape. Accordingly each Power abandoned part of its theories, and each acceded to part of its

[1] *Ibid.*, VII, I, 49. [2] Schmauss, I, 979. [3] Dumont, VII, II, 236.
[4] Hall, "Inter. Law," 5th ed. 691. [5] State Papers, 1853–4, Vol. XLIV, 105–9.

ally's theories, and out of the compromise was evolved the present rule—

A neutral flag covers enemy's goods, except contraband of war; neutral goods, except contraband of war, are not liable to seizure under the enemy's flag.

According to the Earl of Clarendon, who defended the Declaration of Paris in the House of Lords, these provisions were in accordance with the *jus naturæ* principle of reason and justice, and the *communis gentium consensus*. Every other maritime power in the world had, he declared, protested against our practice, which was not consonant to the general practice of Europe.[1]

Neutral goods on enemy's ships still liable to incidental loss.—Although free, neutral goods are still liable to incidental losses arising from contamination with a belligerent ship. The owner is not therefore entitled to be indemnified for damage sustained through the loss of time or markets.

Neither is he entitled to compensation for the total or partial loss of the goods which are destroyed with the ship owing to the necessities of the captors.

In the case of two German ships, the "Ludwig" and the "Vorwärts," where the neutral goods had been destroyed with the ships, it was decided by the French Prize Court in 1872, that though

"under the terms of the Declaration of Paris neutral goods on board an enemy's vessel cannot be seized, it only follows that the neutral who has embarked his goods on such vessel has a right to restitution of his merchandise, or, in case of sale, to payment of the sum for which it may have been sold; and that the Declaration does not import that an indemnity can be demanded for injury, which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture"; and that in this case "the destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity."[2]

[1] Hansard, CXLII, 488–501.
[2] Calvo, sec. 3033.

CHAPTER V

RIGHT OF SEARCH, OR RIGHT OF VISIT AND SEARCH

THE right to stop, detain, and overhaul merchant vessels on the high seas can only be exercised by belligerent ships of war lawfully commissioned during the continuance of the war.

It is now generally conceded by all jurists and accepted by all nations as a rule of International Law, that the right of search belongs to belligerents, and to belligerents only.

This right is, as Vattel points out, a logical sequence of the doctrine of contraband. Without the right of search it would become impossible to prevent the carriage of contraband goods. The mere duty of self-preservation gives to belligerent nations this right.

"The right of visiting and searching merchant ships upon the high seas," said Sir William Scott in the "Maria," "whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say be the ships, the cargoes, and the destinations what they may, because till they are visited and searched it does not appear what the ships, the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for the practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the Law of Nations unanimously acknowledge it, without the exception of Hubner himself, the great champion of neutral privileges.[1]

As a proof of the antiquity of this right, it is interesting to observe that it appears to have been recognized as early as 1164 by the maritime Christian and Mohammedan Powers of the Mediterranean.[2]

A distinction was at one time drawn by the Government of

[1] 1 Rob., pp. 359–60.

[2] Twiss, Vol. II, 147, 2nd ed.

Great Britain between the right of visit and the right of search. They contended that in time of peace a ship of war was entitled to visit a merchant vessel in order to ascertain whether she was justly entitled to the protection of the flag under which she was sailing.

The reason for this claim was in order to discover the real nationality of vessels suspected of being engaged in the slave trade.

It was contended, on the other hand, that there was no such distinction in International Law; that right of visit implied right of search, and that "right of visit" was always used by continental jurists in the sense of right of search; that the terms were, in fact, synonymous, and that no such right of visit in time of peace was known to International Law.

Great Britain yielded to these arguments, and in 1858 abandoned her claim.

The right of approach, however, has been conceded. Ships of war authorized to arrest pirates and other public offenders may approach any vessel descried at sea for the purpose of ascertaining their real characters. Signals or words only may be exchanged, but if these are ambiguous, and from the information given by others or the behaviour of the vessel is otherwise suspicious, the commanders of the ships of war are not liable in damages for exercising right of search, even if the vessel should prove to be innocent. But if the mistake is inexcusable they will be liable. If the vessel is guilty, then their action is legal *ab initio*.[1]

Merchant Vessels.—The right of visitation and search is confined exclusively to private merchant vessels. Public vessels are exempt. This rule is universally admitted by all jurists, and in the practice of all nations.

"A public vessel," says Wheaton, "belonging to an independent sovereign is exempt from every species of visitation and search even within the territorial jurisdiction of another State; a fortiori must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation."

The question of how far a public vessel was liable to civil or criminal process in a British port was discussed, but not decided, in the case of the "Prins Frederick."[3]

In the United States, however, it was decided in the case of the *Exchange* v. *McFadden*[4] that a public vessel of a foreign Power, entering their ports and demeaning herself in a friendly

[1] Lawrence, "Inter. Law," 393–5; Halleck, XI, 268.
[2] "Elem. Int. Law," Part. IV, ch. III, sec. 18.
[3] 2 Dodson, 451. [4] 7 Cranch, 116.

manner, was exempt from municipal jurisdiction. This exemption was said to be founded, not upon the inherent right of foreign Powers, but upon principles of public comity and convenience, and arose from the presumed consent of nations. This consent might be withdrawn upon notice, without offence, and if after such notice a foreign public ship came into their ports she became amenable to the municipal jurisdiction to the same extent as any other vessel; and, further, that although a public ship and her armament might be exempt, her prize property brought into port was subject to the local jurisdiction for the purpose of examination and inquiry, and in a proper case of restitution.

In France there is no interference with the domestic discipline on board foreign merchant vessels, nor with crimes or offences committed by her officers or crew against each other, provided the peace of the port is not disturbed. But if crimes or offences are committed on board against persons not forming part of her officers and crew, or by any other person not a member of the crew, or by the officers and crew against each other whereby the peace of the port is disturbed, then the local authority is entitled to interfere.

A vessel admitted into a French port is of right "amenable to the municipal law and its crew to the municipal tribunals for offences committed on board against persons not belonging to the ship, as well as in actions for civil contracts entered into with them."[1]

Mail-boats.—Neutral mail steamers and other vessels carrying mails, even although the property of a neutral Government, are not exempt from the ordinary process of the tribunals of a belligerent Power, unless expressly exempted by treaty. But the mere innocent and unconscious carriage of enemy despatches does not incriminate the cargo or the ship.

Thus mail-packets are by International Law still liable to visitation and search. For instance, the Russians were clearly within the law when they visited and searched the British mail-steamer "Osiris" in the Mediterranean in May, 1904, in order to discover whether or not she carried Japanese mails.

But if the mail-steamer had been the property of the British Government the case might have been different. For instance, in the case of the "Parlement Belge,"[2] which was the property of the King of the Belgians as reigning sovereign, it was held that the subordinate and partial use for trading purposes did not take away its public character and deprive it of the immunities thereby conferred.

[1] Ortolan, "Règles Inter. de la Mer.," tom. I, 193–8.
[2] 42 L. T., 273.

Modern Practice.—The general inconvenience of stopping and searching mail-boats has, however, in recent years been mitigated by the practice adopted by some of the Powers. In the war with Mexico, the United States allowed British mail-steamers to pass unmolested, in and out of the port of Vera Cruz. In 1862 they went still further, and exempted from search the mail-steamers of all neutral Powers provided that the mails were duly sealed and authenticated, and were not "simulated mails verified by forged certificates and counterfeit seals." If the mail-boat were otherwise incriminated and liable to capture, she might be seized, but the mails were to be forwarded unopened to their destination.

This practice was followed by France in 1870, when, at the commencement of the war, she announced that—

"When a vessel subjected to a visit is a packet-boat engaged in postal service, and with a Government agent on board belonging to the State of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board."

The arrest, during the war between China and Japan, on a French mail-boat in Japanese waters at Kobe, of two American citizens who were proved by their papers to be proceeding to China to assist the Chinese Government with certain military inventions, though a novel proceeding, was, in Professor Holland's opinion, probably justifiable.[1]

In the Hispano-American war, President McKinley declared by proclamation of April 26th, 1898, that—

"The voyages of mail-steamers were not to be interfered with, except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

The "Panama"[2] was a Spanish mail steamer on a voyage from New York to Havana, carrying a general cargo, passengers, and mails. In accordance with a contract entered into with the Spanish Government long prior to the war, she carried guns, rifles, ammunition, and cutlasses, and it was a term of the contract that in case of war the Government might take possession, increase her armament, and use her as a ship of war.

It was found by the Supreme Court of the United States that the vessel was owned by a subject of the enemy; possessed an armament fit for hostile use; was intended to be used as a war vessel in the event of war; was destined to a port of the enemy; and liable on arriving there to be taken possession of by the enemy and employed as an auxiliary cruiser of the enemy's navy in the war with the United States.

[1] "Studies in Int. Law," 122.

[2] 176 United States, 535 (1899).

The "Panama" was therefore declared to have been lawfully captured, and was condemned.

In the course of the Anglo-Boer war a similar indulgence was granted by Great Britain to German mail steamers, which were not to be stopped merely on suspicion that noxious despatches were being carried.

But the practice has been by no means uniform. Spain failed to follow the example set by America in 1898, and in 1902 Great Britain and Germany stopped all mail steamers proceeding to the ports of Venezuela, and, after overhauling the mail-bags, detained what appeared noxious, and only sent ashore the remainder.

Immunities of Mail-boats by Treaty.—The middle of the nineteenth century witnessed the commencement of an organized postal service between the majority of the recognized States of the world, in consequence of which international conventions were constituted for the provision and protection of mails in case of war.

By the Postal Treaty of 15 December, 1848, between Great Britain and the United States, it is provided that—

"In case of war between the two nations the mail-packets of the two offices shall continue their navigation without impediment or molestation until six weeks after a notification shall have been made, on the part of either of the two Governments, and delivered to the other that the service is to be discontinued; in which case they shall be permitted to return freely and under special protection to their respective ports."[1]

By the treaty of 24 September, 1856, between Great Britain and France[2] the following stipulations relating to mails were agreed upon:—

"*Art. V.*—When the packets employed by the British Post Office or by the French Post Office, in the execution of Art. I. and II. of the present Convention, are national vessels, the property of Government, or vessels chartered or subsidized by Government, they shall be considered and treated as vessels of war in the ports of the two countries at which they regularly or accidentally touch, and be there entitled to the same honours and privileges. These packets shall be exempted in the said ports, as well upon their entrance as upon their departure, from all tonnage, navigation, and port dues, excepting, however, vessels freighted or subsidized by Government, which must pay such dues in those ports when they are levied on behalf of corporations, private companies, or individuals. They shall not on any account be diverted from their special duty or be liable to seizure, detention, embargo, or *arrêt de Prince.*

"*Art VI.*—The packets of the two offices shall be at liberty to take on board or land at the ports of the two countries at which they touch, whether regularly or accidentally, specie and gold and silver bullion, as

[1] U.S. Statutes at Large, Vol. IX, 965, Art. 20.
[2] State Papers, Vol. XLVI, 195.

well as passengers of whatever nation they may be, with their wearing apparel or luggage, on condition that the captains of these packets shall submit to the sanitary, police, and customs regulations of these ports concerning the arrival and departure of travellers. Nevertheless, the passengers admitted on board these packets who do not think fit to land during the stay at one of the said ports, shall not under any pretext be removed from on board, be liable to any search, or be subjected to the formality of a *visa* of their passports."

"*Art. XI.*—In case of war between the two nations, the packets of the two offices shall continue their navigation until a notification is made on the part of the two Governments of the discontinuance of the postal communications, in which case they shall be permitted to return freely and under special protection to their respective ports."

On the High Seas.—When the Russian gunboat "Krabi" stopped and searched the British mail steamer "Osiris" between Brindisi and Port Said, a portion of the British Press contended that belligerents had no right to search neutral vessels so far from the scene of hostilities. It may be at once stated that no such limitation is known to International Law. The right of search may be exercised everywhere except in neutral territorial waters.

In the words of the notice on this point issued to mariners by the Board of Trade in March, 1904—

"Masters of British merchant vessels must immediately stop or heave to when summoned on the high seas to do so by a warship of either belligerent, and must not resist being visited or searched for contraband of war by such warship, as any attempt on their part to evade or resist visit or search may be attended with serious consequences to themselves and to their vessels and cargoes."

Noxious Despatches.—Despatches connected with the purposes of the war are noxious.

Their character may in some cases be surmised from their destination. When they are addressed to persons in the naval or military service of a belligerent, or to his unaccredited agents in a neutral State, they may be presumed to refer to the war.

If, therefore, when opened they are found to have been written with a belligerent purpose, the carrier cannot plead ignorance of their contents. He can only plead successfully that he was ignorant of their possession or of the character of the persons to whom they were addressed.

They have been defined by Sir W. Scott to be "official communications of official persons on the public affairs of the Government."[1] The gist of the offence is the *fraudulent* or hostile carriage of despatches to or from a belligerent port.[2] But if although the voyage terminates at a neutral port the ultimate

[1] "Caroline," 6 Rob., 465 (1808). [2] Wheaton, 461.

destination is to a belligerent, the carriage of such hostile papers would be an offence, and the fact that the voyage was between two neutral ports would merely be allowed in mitigation of the penalty.[1]

"Two classes of despatches," says Mr. Hall, "are in this manner distinctly marked: those which are sent from accredited diplomatic or consular agents residing in a neutral country to their Government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral State. The despatches are themselves exempt from seizure on the ground that their transmission is as important in the interest of the neutral as of the belligerent country, and to carry them is therefore an innocent act. Those, on the other hand, which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral State, may be presumed to have reference to the war, and the neutral is bound to act on that presumption. If, therefore, they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. Letters not addressed to persons falling within either of the above categories are prima facie innocent; if they contain noxious matter they can only affect the vessels when other facts show the knowledge of the owner or master."[2]

In 1877 the Russian Government in their war with Turkey declared that they would treat despatches and correspondence of the enemy as analogous to contraband of war.[3]

In the case of the "Constantia,"[4] a Danish vessel captured on a voyage from the Isle of France to Copenhagen, a packet was on board to be delivered to the French ambassador at Copenhagen, and to be forwarded by him to the Government in France. The master had taken charge of the packet knowingly, and though there did not appear to have been any fraudulent concealment, he had been in the custody of a British frigate for fifteen days before he disclosed the packet. The ship and cargo were condemned.

The "Susan,"[5] an American vessel, was captured on a voyage from Bordeaux to New York with a packet on board addressed to the Prefect of the Isle of France, relating apparently only to the payment of that officer's salary. The master was ignorant of the contents of the packet, stating that it had been delivered to him by a private merchant as containing some old newspapers and some shawls. The Court held that a master is not at liberty to

[1] Phillimore, "Int. Law," Vol. III, 370.
[2] "Int. Law," 5th ed., 675.
[3] "Journal de St. Petersburg," $\frac{14}{26}$ Mar.
[4] 6 Rob., 261, note (1808).
[5] *Ibid.*, 461, note (1808).

plead his ignorance, but that if he becomes the victim of imposition, practised on him by his private enemy, or by the Government of the enemy, he must seek his redress against them. In this case he did not appear to have used any caution to inform himself of the nature of the papers, and although they were not fraudulently concealed, they were not produced to the captors as they ought to have been. The ship was condemned.

The "Hope"[1] was an American vessel captured on a voyage from Bordeaux to New York, having on board various despatches to the Government officials in the French West Indies and the Isle of France. She also carried a military officer of rank, who was returning to Martinique, and who had shipped as a merchant's clerk.

The Court disbelieved the master's plea of ignorance.

"It was scarcely credible that the master could have been deceived with respect to the character of a military officer of high rank, so as to be imposed upon by the disguise of a merchant's clerk, which he had pretended to assume; that he was further discredited by the representation which he had attempted to impose upon the Court, respecting the manner in which the trunk (which contained the despatches) was concealed."

The ship was condemned.

The "Madison"[2] was an American ship which had been captured by a French privateer and carried into Dieppe, whence, after obtaining her release, she proceeded in ballast to Baltimore. On this return voyage she was captured by an English cruiser, and proceedings were instituted upon the ground (*inter alia*) that she had sailed from a blockaded port carrying despatches from the Government of the enemy to a consul of the enemy in America. These despatches, which turned out to be of an innocent character, were sent through an agent of the American Ambassador at Paris by the Danish Government, with which we were at war, to the Danish Consul-General at Philadelphia.

Sir William Scott was of opinion that a communication from the Danish Government to its own Consul in America did not necessarily imply anything that was of a nature hostile or injurious to the interests of Great Britain. It was not to be so presumed: such communications must be supposed to refer to the business of the Consul-General's office, which was to maintain the commercial relations of Denmark with America. If such communications were forbidden, the functions of such officials would cease altogether.

"It has been said," declared the learned judge, "that this communication of the Danish Government, with one of its delegates in another

[1] 6 Rob. 463 (1808). [2] 1 Edw., 224 (1810).

country, through the medium of the American minister at Paris, is a matter in which the neutral Government is not at liberty to interpose and carry on, and that the neutral Government is not to concert measures with the enemy, for the purpose of assisting in communications relating solely to his own commerce. But I take it to be a correspondence in which the American Government is itself interested. A Danish Consul-General in America is not stationed there merely for the purpose of *Danish* trade, but of *Danish-American;* his functions relate to the joint commerce in which the two countries are engaged, and the case therefore falls within the principle which has been laid down in the case of the 'Caroline' in regard to despatches from the enemy to his Ambassador resident in a neutral country. In the transmission of these papers America may have a concern and an interest also; and therefore the case is not analogous to those in which neutral vessels have lent their services to convey despatches between an enemy's colony and the mother country. Here there is no such departure from neutrality as to subject the vessel to confiscation."

The ship was ordered to be restored upon payment to the captors of their expenses.

Character of Despatches.—The comparative importance of particular papers is, as Sir William Scott declared, immaterial. The Court will not construct a scale of relative importance. It is not to be argued that this or that letter is of small moment. The true criterion is that the communication is on the public business of the State, and passing between public persons for the public service. If the papers relate to public concerns, be they great or small, civil or military, the Court will not split hairs, and consider their relative importance.[1]

"It is impossible," the learned judge declared in another case, "to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy; it is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature."[2]

Hautefeuille considered that the carriage of despatches could only invest a neutral vessel with a hostile character, where it was specially employed for that purpose by a belligerent, and that it could not affect with criminality either a regular postal packet or a merchant ship, which takes a despatch in the ordinary course of conveying letters, and of the contents of which the master must necessarily be ignorant.[3]

The fraudulent carriage of despatches of the enemy is a criminal act involving the confiscation of the ship, and of the cargo also if it is the property of the owners of the ship.[4]

[1] "Caroline," 6 Rob., 465. [2] "Atalanta," 6 Rob., 455.
[3] "Droits des Nations Neutres," tom. II, 463.
[4] "Atalanta," 6 Rob., 455–60.

Noxious Persons.—1. The transport in a neutral ship, hired by, or under the control of, a belligerent for that purpose, of naval or military persons in the service of the belligerent is a criminal act.

The "Orozembo" was an American vessel ostensibly chartered by a merchant at Lisbon "to proceed in ballast to Macao and then to take a cargo to America," but which was afterwards, by his directions, fitted up for the reception of military officers of distinction, and two persons in civil departments in the Government of Batavia who had come from Holland to take their passage to Batavia, under the appointment of the Dutch Government. In condemning the vessel as a transport in the service of the Dutch Government, Sir William Scott asked what number of persons would incriminate the vessel. Number alone, he declared, was immaterial, since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France might be a much more noxious act than the conveyance of a whole regiment.

(*a*) **Ignorance.**—As in the case of despatches, ignorance on the part of the owner or master cannot successfully be pleaded. It is sufficient if there is an injury to the belligerent arising from the employment in which the vessel is found.[1] If imposition has been practised it operates as force.[2]

(*b*) **Compulsion.**—In the "Caroline"[3] there was an absence of intention in the owner and in the master. The latter was an involuntary agent, acting under compulsion put upon him by the officers of the French Government, and so far as intention alone is considered, perfectly innocent. But none the less, as in the case of ignorance, the penalty of confiscation must be enforced, and redress by way of indemnity must be sought against those who either by deceit or compulsion have exposed the vessel to danger. Otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible in the greater number of cases to prove the knowledge and privity of the immediate offender.[4]

2. The transport in a neutral ship not hired by, or under the control of, a belligerent, of civil or military persons is not a criminal act unless the service performed is such as might be rendered by a belligerent transport, and such as substantially to assist his military operations.

[1] The "Orozembo," 6 Rob., 430–4.
[2] *Ibid.*, 435.
[3] 4 Rob., 256.
[4] "Orozembo," 6 Rob., 435.

In the South African war the German mail steamer, the "Bundesrath," left Aden for Lorenzo Marquez on 5 December, 1899, with twenty-seven alleged passengers on board. She was intercepted by the "Magicienne" and brought into Durban on the ground of carrying ammunition as contraband of war. The carriage of enemy troops does not appear to have been raised, and as a partial search failed to reveal any contraband, the ship was released on 18 January.

The case of the German mail steamer "Herzog" was very similar. She left Aden on 18 December, 1899, with about forty Dutch and German medical and other officers and nurses on board. She was captured by the "Thetis" and brought into Durban on 6 January, the senior naval officer there telegraphing to the Admiralty that there was "a large ambulance party on board, most of whom had revolvers."

In spite of this fact, however, as after a summary search no contraband of war was discovered, the vessel was ordered to be released.

The right of a belligerent to take out of an innocent neutral vessel noxious persons.—Whether such a right exists apart from some conventual obligation appears more than doubtful, and the uncertainty surrounding the phrase "noxious persons" renders the preposition still more ambiguous.

"The doubt on the question propounded," says Dana,[1] "arises chiefly from the fact that great numbers of treaties have provided that the persons of enemies shall not be taken from free ships *unless they be military men in the actual service of the enemy;* seeming to imply, not only that the latter may be so taken, but also that, without this provision, any enemy could be so taken, whether a military man or not. The first trace of this provision is in a treaty of commerce between the Netherlands and Sweden of 1676. In a clause of that treaty which secures freedom to carry enemy goods not contraband in neutral vessels, is the further provision that either party to the treaty may carry in their vessels the subjects of an enemy of the other party, and that they shall not be taken or forced therefrom unless they be military commanders or officials—'*nec eos inde evelli aut au ferri licebit, exceptis tantum ducibis sive officialibus hostilibus.*'[2] It next appears in the Treaty of Nimeguen in 1678, at the end of Art. 22—'And as it has been provided above that a free ship shall be free to carry her cargo, it is further agreed that this liberty shall extend also to persons who shall be found in a free ship, to the effect that although they be enemies of one or the other of the contracting parties, yet when in a neutral vessel they shall not be taken therefrom, provided they be not military persons and effectively in the service of the enemy.' This clause was copied into the treaty between Sweden and Holland of the next year;

[1] Dana's "Wheaton," 656, note.
[2] Dumont, "Corps Dipl.," VII, 316.

into the Commercial Treaty of Ryswick of 1697; into the treaties of Utrecht of 1713, between France and the Netherlands and France and England; and into the treaty of 1739 between France and the United Provinces. The only change is that 'actuellement au service desdits ennemis,' is substituted for 'effectivement au service, etc.' This clause is also in the treaty between France and Hamburg of 1769.

"This provision afterwards appears in the conventions between France and the United States of 1778 and 1800, between the United States and Holland in 1782, between the United States and Sweden in 1783 and 1816, the United States and Prussia of 1785, the treaty between France and England of 1786, and between the United States and Spain of 1795 and 1819, and in the treaties of the United States with Columbia in 1824, Central America in 1825, Brazil in 1828, Mexico in 1831, Chili in 1832, Peru in 1851, Venezuela in 1836, and, in fact, with nearly if not all the South American States. In the French and English treaty of 1786 is added after the words 'actuellement au service desdits ennemis,' the words 'et se transportant pour être employés comme militaire dans leurs flottes ou dans leurs armées,' and in the treaty between France and Hamburg of 1769 after the words, 'au service des ennemis' is added 'auquel cas, ils seront faits prisonniers de guerre.' The clause does not exist in any form in any treaty between Great Britain and the United States."

Thus where the Powers concerned are parties to such treaties it must be admitted that a class of persons of a defined character and in defined predicament may be taken out. This practice had its origin, Dana considers, in the fact that two hundred and fifty years ago, and for some time afterwards, it was a common custom to take out contraband goods without carrying the vessels in for adjudication, and so the removal of noxious persons without adjudication did not appear singular.

Between the parties to these treaties the only question is on the construction of the phrase "noxious persons." Are they military persons in the actual service of the enemy? If they are, then, apart from any further question as to the offence committed by the vessel, they may be taken out.

But even in the absence of treaty stipulations, a strong argument might be advanced in favour of the right to take out military persons in the actual service of the enemy.

"Yet," says Dana, "it is out of harmony with the practice of modern times in cognate cases. The proper rule would seem to be, that if there is no probable cause for thinking the vessel in fault for carrying them, and as no prize proceedings can be had against the persons, the persons should not be taken out of the vessel. But if the case warranted proceedings against the vessel on grounds of probable cause to believe her in fault, she should be brought in for proceedings and the persons held as prisoners of war on the responsibility of the State to the neutral flag, until the case is determined. Still, it must be admitted that the subject is an embarrassing one, whether the right to take such persons be generally conceded or be

coupled with prize proceedings against the vessel, and seems to present a case for some special proceedings of a peculiar character, arranged by convention on national guarantees."

Exceptions to Right of Visitation and Search.—1. Messengers and couriers of public ministers in the service of a belligerent resident in a neutral country, together with their despatches, are exempt on the high seas from every species of visitation and search, provided they bear passports attesting their official character furnished not only by their own Government, but also by the enemy, and provided the vessel or *aviso* also carries a commission or pass. In the "Caroline"[1] Sir William Scott drew the distinction between the carriage of despatches of a belligerent from its colonies to the mother country and the carriage of despatches of an Ambassador in the service of a belligerent, but *resident in a neutral country*. The former, he said, is a criminal interposition, which leads to condemnation because the belligerent has the right to interrupt and to cut off *all* communication between the enemy and his settlements, and to the utmost of his power harass and disturb this connexion, and he is entitled to assume that these despatches are hostile to him; but an Ambassador resident in a neutral country is there for the purpose of maintaining relations of amity between that State and his own Government.

The neutral country has a right to preserve its relations with the enemy, and a belligerent is not at liberty to assume that any communication between them can partake in any degree of the nature of hostility to him. As Vattel remarks:—

"Couriers sent or received by an Ambassador, his papers, letters, and despatches, all essentially belong to the Embassy, and are consequently to be held sacred, since if they were not respected the legitimate objects of the Embassy could not be attained, nor would the Ambassador be able to discharge his functions with the necessary degree of security."[2]

To open the letters of an Ambassador has been declared to be a breach of International Law, although this privilege may be lost when the Ambassador himself is guilty of some breach of his duties towards the neutral State.[3]

The case of the "Trent," which occurred in 1862 during the American Civil War, has given rise to a great deal of controversy without resulting in any agreement between the parties immediately concerned and the other Powers.

The "Trent" was a British mail steamer running on her usual course from Havana to Nassau, both neutral ports. Two Confederate diplomatic agents, Messrs. Slidell and Mason and their

[1] 6 Rob., 461 (1808).
[2] Vattel, Lib. IV, iv, ch. ix, sec. 123. [3] Halleck, I, 275-6.

suite, embarked at Havana as ordinary passengers for Nassau with the intention of proceeding to England and France. Whilst on the high seas, just before reaching Nassau, the "Trent" was stopped by a Federal ship of war, the "San Jacinto." Her commander, Captain Wilkes, in spite of the protests of the "Trent's" captain, took Messrs. Slidell and Mason with their secretaries out of the ship, which was then allowed to continue her voyage.

Upon the demand for their restoration by Great Britain, backed up by the Ambassadors of France, Austria, Prussia, Italy, and Russia, Messrs. Slidell and Mason were released. The contention by the Federal Government was that the persons seized were contraband of war, and that the "Trent" being a neutral vessel, the "San Jacinto," as a belligerent cruiser, was entitled to stop her for the purpose of ascertaining her true national character and of seizing any contraband found on board. The first contention was met by Sir William Harcourt's citation from Sir William Scott's judgment in the "Imina": "Goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful." The essence of contraband, added Sir William Harcourt, is twofold—there must be a hostile quality and a hostile destination.

The most serious mistake made by the Federal captain was the omission to take the "Trent" before a prize court and the arbitrary seizure of Messrs. Slidell and Mason. It is a rule of International Law that a ship and cargo are not lawful prize until condemned by a competent court, and that until so condemned a captor has no right to do anything beyond bringing the vessel before the court.

Mr. Seward, in his Note to the British Government, maintained that an Ambassador from a belligerent Power on his way to a neutral port is liable to capture on board a neutral vessel as contraband of war.

This view, thus stated without any modifications, has never been accepted by International Law. Ambassadors and diplomatic agents are not contraband of war, although in some respects they are analogous, and are sometimes termed analogues of contraband. They are, in fact, quite different, and are governed by different rules.

But there were three points of real substance in the case of the "Trent"—first, the ultimate destination of the diplomatic agents; secondly, that the Confederate States had not yet been recognized as an independent belligerent, and so the agents had not acquired an official character; and, lastly, that they had not been recognized by the Governments to which they were accredited. There

can be no doubt that Messrs. Slidell and Mason intended to proceed to England and France for the purpose of persuading those countries to recognize the independence of the Confederate States and then to return home. Such a service was of a hostile character.

"Ambassadors," said Sir William Scott in the "Caroline,"[1] "are, in a peculiar manner, objects of the protection and favour of the Law of Nations. The limits that are assigned to the operations of war against them by Vattel and other writers upon those subjects are that you may exercise your right of war against them, wherever the character of hostility exists; *you may stop the Ambassador of your enemy on his passage;* but when he has arrived and has taken upon himself the functions of his office and has been admitted in his representative character, he becomes a sort of middle-man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested."

On the other hand, Earl Russell contended that for the purpose of avoiding the difficulties which arise from the non-recognition of the independence of the *de facto* Government of one of the belligerents by the other belligerent or by neutrals—

"*Diplomatic agents* are frequently substituted, clothed with the powers and immunities of ministers, although not invested with the representative character nor entitled to diplomatic honours."[2]

It was upon this footing that Messrs. Slidell and Mason must have been sent, and their reception upon this footing could not have been justly regarded as a hostile or unfriendly act towards the Federal States. The conveyance of such agents and their despatches (if any) on board the "Trent" was not and could not be a violation of the duties of neutrality, and since their destination was *bona fide* neutral, they could not be contraband.

Sir William Scott's dictum that "you may stop the Ambassador of your enemy on his passage" was declared to be irrelevant. No writer of authority has ever suggested that an Ambassador proceeding to a neutral State on board one of its merchant vessels is contraband of war.

The true rule appears to be that you may stop an enemy's Ambassador in any place of which you are yourself the master, or in any place where you have a right to exercise acts of hostility. Your own territory or ships are places of which you are yourself the master. The enemy's territory or ships are places in which you have a right to exercise acts of hostility. In neutral vessels, innocent of any violation of neutral duties, you have no such right.

[1] 6 Rob., 467–8 (1808).

[2] Wheaton, "Elements," Part III, ch. 1, sec. 5.

If the real and ultimate destination of the "Trent" had been to an enemy's port, it is undoubtedly laid down by British authorities that if the real destination of the vessel be hostile it cannot be covered and rendered innocent by a fictitious destination to a neutral port.

Upon this case the following question has been formulated by Prof. Mountague Bernard as still remaining unsettled:—

"Does a neutral ship forfeit that character and expose itself to condemnation by conveying as passengers from one neutral port to another persons going as diplomatic agents of the enemy to a neutral country?"[1]

The American Government, as we have seen, answered the question in the affirmative, in all those cases at least in which the agent has not yet acquired an official character, and the community he is commissioned to represent has not been recognized as independent. Great Britain and the other Powers replied in the negative.

Both parties appear to have relied upon a false principle. The principle of contraband does not apply. By the strict letter of the law, neither an Ambassador nor a diplomatic agent is clothed with any immunities until he is recognized by the Power to which he is accredited as the representative of an independent belligerent. In the words of Sir William Scott, "you may stop the Ambassador of your enemy on his passage." It is true that Sir William was dealing with the case of a passage between the mother country and her colonies, but the language he adopted from Vattel is quite general, and is not limited to a passage between neutral ports. If the Confederate States had been recognized by Great Britain and France as independent, and Messrs. Slidell and Mason had been admitted as their representatives (e.g. by wire), then they would have become clothed with the immunities of Ambassadors; but as unofficial agents with despatches upon a mission hostile to one belligerent, it would appear that the carriage of such persons is a breach of neutrality, inasmuch as it substantially assists the military operations of one belligerent.

It is an undoubted rule of International Law that an Ambassador, diplomatic agent, or other public minister proceeding to his post in time of war, must be provided with a safe-conduct or passport from the Government of the State with which his own country is at war, to enable him to travel securely through its territories.[2]

[1] "Neutrality of Great Britain," p. 223.
[2] Wheaton, "Elements," 4th ed., p. 330.

In laying down this rule that—

"A passage may not only be refused to the ministers of an enemy sent to other sovereigns, but if they undertake to pass privately and without permission into places belonging to their master's enemy, they are liable to be arrested."

Vattel cites the following case furnished by the Anglo-French war of 1743: An Ambassador of France going to Berlin, by the imprudence of his guides passed through a village within the electorate of Hanover, of which the sovereign, the King of England, was at war with France. He was arrested, and afterwards sent over to England. As His Britannic Majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia made any complaint.[1]

Belligerent ship of war lawfully commissioned.—A private ship the property of a subject of one belligerent may lawfully seize a private or public ship the property of the other belligerent with which it is at war, although unfurnished with a Commission of War or Letters of Marque.

"If the subject," says Story J., "capture without a commission, he can acquire no property to himself in the prize; and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy, he violates no rights by capture."[2]

But all prizes captured by an English non-commissioned ship become the property of the State, and are termed Droits of Admiralty. The same principle applies to captures made by commissioned ships, but in practice, unless for good reason shown to the contrary, lawful prize is given up to its captors.

Mr. Hall denies the right of a non-commissioned ship to attack, on the ground that the weight of practice and of legal authority is against it. It is, he says, "too much opposed to the whole bent of modern ideas to be now open to argument."[3] The weight of authority certainly appears to be the other way.

But if such a ship attack a vessel belonging to a neutral State she may be treated as a pirate. A Commission of War empowers the person to whom it is granted in time of war *to seize* not only the ships and goods of the enemy, but also such ships and goods

[1] B. IV, c. VII, sec. 85.

[2] "The Nereide," 9 Cranch, at p. 449. See also 2 Bro. Civ. and Adm. App., 524; Grotius, lib. 3, ch. 6, sec. 8, 9, 10; Barbeyrac's Note on sec. 8; Puffendorf, lib. 8, ch. 6, sec. 21; Bynkershoek, 2 P.J., ch. 3, 4, 16, 17; 2 Woodes' Act., 432; Consol. del Mare, ch. 287–8; 4 Inst., 152, 154; Zouch Adm., 101; Casaregis Disc., 24, n. 24; Com. Dig. Admiralty, E 3; Buls. c. 27.

[3] "Inter. Law," 5th ed., 530.

the property of neutral Powers as are liable to confiscation pursuant to treaties or the Law of Nations. A Letter of Marque and Reprisals empowers the person to whom it is granted to make reprisals in *time of peace* against the ships and goods of the subjects of that State which has refused to make reparation for an injury done by one of its subjects.

The term *privateers*, which appears to have been first used in a letter from Sir Leoline Jenkins, dated 5 December, 1665, was originally intended to designate a particular class of private armed vessels employed by the Admiralty in the reign of Charles II. It is to-day applied indiscriminately to private vessels sailing under Commissions of War or under Letters of Marque and Reprisals. A privateer has consequently been thus defined:—

"A privateer is an armed vessel belonging to one or more private individuals, licensed by Government to take prizes from an enemy; its authority in this regard must depend altogether upon the extent of the commission issued to it, and is qualified and limited by the laws under which the commission is issued."[1]

In the "Sea Laws," a text-book published at the commencement of the eighteenth century and representing the opinion of the seventeenth, it is quaintly said:—

"Our laws take not much notice of these privateers, because the manner of such warring is new and not very honourable, but the diligence of our enemies in this piratical way obliges us to be also diligent for the preservation of our commerce."[2]

The first attempt to discourage the practice of privateering occurs in the treaty of commerce concluded at Stockholm in 1675 between Sweden and the United Provinces, whereby it was provided:—

"That none of their subjects should be allowed to equip privateers against the subjects of the other, nor to accept Commissions of War from their respective confederates."

Owing to the exigencies of war, however, Sweden found herself compelled to depart from these stipulations, and was condemned to make compensation to the States-General for her violation. Curiously enough the United States of America were the next to follow this example. In 1785 a treaty was concluded with Prussia whereby each party agreed in case of war between them not to grant commissions authorizing privateers to seize the merchantmen of the other party freighted with innocent cargoes. The real object of this policy appears to have been to secure immunity

[1] The "Thomas Gibbons," 8 Cranch, 421.
[2] 3rd ed., 472.

for private property which was not contraband and was not destined for an enemy port.

Upon the renewal of the treaty in 1799 this stipulation was not renewed. But in 1856 the United States returned to her old policy, and upon the Powers declining to add to the Declaration of Paris a clause exempting all private property on the high seas belonging to one belligerent, except contraband, from seizure by public armed vessels of the other belligerent, refused to be a party to the Declaration, the first article of which recites that "Privateering is and remains abolished."

In 1854 President Pierce, in his annual message to Congress, had said:—

"Should the leading Powers of Europe concur in proposing as a rule of International Law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily admit them on that broad ground."

Upon the invitation to adhere to the Declaration of Paris in 1856 the President agreed, provided the following paragraph was added to the first article:—

"And that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent unless it be contraband."

This offer was renewed by Mr. Seward in 1861, and in 1870, in consequence of Bismarck's despatch, the Government expressed the hope that the amendment might be universally accepted.[1]

Bismarck's despatch contained the Prussian Decree of 18 July, 1870, whereby it was declared that French merchant vessels should be no further subject to capture as prize of war than any other neutral vessels.[2] This decree was annulled, as from 10 February, 1870, in consequence of the refusal of the French Government to take reciprocal steps and their action in burning and scuttling prizes taken from the Germans.[3]

By the Italian Mercantile Marine Code, Art. 211, the capture and making prize of the enemy's merchant vessels by ships of war belonging to the State will be abolished by way of reciprocity towards any Power which adopts similar treatment in favour of merchant vessels.

This reciprocal treatment may result from municipal law, diplomatic conventions, or declarations made by the enemy on the first outbreak of war.

[1] State Papers, Vol. LXI, 678.
[2] *Ibid.*, Vol. LX, 923.
[3] "London Gazette," 7 February, 1871.

In the war with Austria in 1866 this practice was observed by both parties respectively.[1]

This principle of the inviolability of private property at sea was adopted by the Institut de Droit International at the Congress of Turin in 1882, of Munich in 1883, and of Heidelberg in 1887 by Sec. 4.

"La propriété privée est inviolable sous la condition de réciprocité, et sauf les cas prévus au Sec. 23."[2]

The Government of Great Britain, which has most to gain by the general recognition of this principle, is, strangely enough, the most consistent opponent to its introduction.

Spain and Mexico, though otherwise parties to the Declaration, repudiated this article, and the former, whilst contenting herself with organizing a service of auxiliary cruisers, declared her intention of granting Commissions of War to privateers.

During the American Civil War, Congress passed an Act on 3 March, 1863, authorizing the President in any foreign or domestic war to issue Letters of Marque, but he does not appear to have availed himself of this power. The Confederate States granted Letters of Marque to several private armed vessels. They also offered their Letters to foreigners, but the restrictive legislation of the maritime Powers and the threat of the Federal States to treat such vessels as pirates, prevented their acceptance.

In the war between Spain and the United States the Government of the latter Power announced its policy would be not to "resort to privateering, but to adhere to the Rules of the Declaration of Paris."[3]

By the Spanish Decree of 23 April, 1898,[4] laying down the rules to be observed, it was declared by Art. 4 that the Government—

"while maintaining their right to issue Letters of Marque, which they expressly reserved in their Note of 16 May, 1857, in reply to the request of France for the adhesion of Spain to the Declaration of Paris relative to maritime war, would organize for the present 'a service of auxiliary cruisers of the navy' composed of ships of the Spanish Mercantile Navy, which would co-operate with the latter for the purposes of cruising, and which would be subject to the statutes and jurisdiction of the navy."

It was further declared by Art. 5 that—

"In order to capture the enemy's ships, to confiscate the enemy's merchandise under their own flag, and contraband of war under any flag, the Royal Navy auxiliary cruisers and privateers, if and when the latter were authorized, would exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with International Law, and any regulations which might be published for the purpose."

[1] Raikes, "Maritime Codes of Italy," p. 178.
[2] Annuaire, 1888, p. 219.
[3] State Papers, Vol. XC, p. 380.
[4] *Ibid.*, p. 159.

It was also further notified by Art. 7, that—

"Captains, commanders, and officers of non-American vessels manned as to one-third by other than American citizens captured while committing acts of war against Spain, would be treated as pirates with all the rigour of the law, although provided with a licence issued by the Republic of the United States."

In spite, therefore, of the Declaration of Paris and of its acceptance by nearly all the Powers, privateering, apart from conventual stipulations, is not an offence against International Law. Suppose, for instance, that Great Britain were at war with the United States, the latter would be at liberty to instruct its privateers to visit all neutral vessels and to capture such as carried enemy's goods or contraband of war, whereas the former, being a party to the Declaration of Paris, would be bound to instruct her privateers to refrain from molesting in any way the vessels of any of the parties to the Declaration, inasmuch as, so far as they are concerned, privateering is abolished.

The reasons advanced by the United States for their refusal to abolish privateering are stated by Mr. Marcy, Secretary of State:—

"The United States consider powerful navies and large standing armies, as permanent establishments, to be detrimental to national prosperity and dangerous to civil liberty. The expense of keeping them up is burdensome to the people; they are in some degree a menace to peace among nations. A large force ever ready to be devoted to the purposes of war is a temptation to rush into it. The policy of the United States has ever been, and never more than now, adverse to such establishment, and they can never be brought to acquiesce in any change in International Law which may render it necessary for them to maintain a powerful navy or large standing army in time of peace. If forced to vindicate their rights by arms, they are content, in the present aspect of international relations, to rely in military operations on land mainly upon volunteer troops, and for the protection of their commerce in no inconsiderable degree upon their mercantile marine. If this country were deprived of these resources it would be obliged to change its policy and assume a military attitude before the world. In resisting an attempt to change the existing maritime law that may produce such a result, it looks beyond its own interest and embraces in its view the interest of such nations as are not likely to be dominant naval Powers. Their situation in this respect is similar to that of the United States, and to them the protection of commerce and the maintenance of international relations of peace, appeal as strongly as to this country to withstand the proposed change in the settled Law of Nations. To such nations the surrender of the right to resort to privateers would be attended with consequences most adverse to their commercial prosperity without any compensating advantages. . . .

"It certainly ought not to excite the least surprise that strong naval Powers should be willing to forego the practice, comparatively useless to them, of employing privateers, upon condition that weaker Powers agree

to part with their most effective means of defending their maritime rights. It is, in the opinion of this Government, to be seriously apprehended that if the use of privateers be abandoned the dominion over the seas will be surrendered to those Powers which adopt the policy and have the means of keeping up large navies. The one which has a decided naval superiority would be potentially the mistress of the ocean, and by the abolition of privateering that domination would be more firmly secured. Such a Power engaged in a war with a nation inferior in naval strength would have nothing to do for the security and protection of its commerce but to look after the ships of the regular navy of its enemy. These might be held in check by one-half or less of its naval force, and the other might sweep the commerce of its enemy from the ocean. Nor would the injurious effect of a vast naval superiority to weaker States be much diminished if that superiority were shared among three or four great Powers. It is unquestionably the interest of such weaker States to discountenance and resist a measure which fosters the growth of regular naval establishments."[1]

Since these words were penned the wave of modern Imperialism has passed over the United States, and the creation of a powerful navy, together with the acquisition of over-sea possessions, may very considerably modify the force of these views. Moreover such views, however intelligible, have not, as Sir Henry Maine points out, always prevailed. In the treaty with Prussia of 1785, negotiated by Benjamin Franklin, it was agreed that neither party should commission privateers. And subsequently President Monroe had declared that it was unworthy of civilized States to prey upon private property at sea. Indeed, the Government has from time to time expressed its willingness to adhere to Art. 1 of the Declaration, provided that the Powers would go one step further and apply the principle of the inviolability of all private property on the high seas.

In the treaty with Italy of 26 February, 1871,[2] it was agreed that in the unfortunate event of war, the private property of their respective citizens and subjects, with the exception of contraband of war, should be exempt from capture or seizure on the high seas or elsewhere or by the military forces of either party. This exemption was not, of course, to apply to vessels and their cargoes attempting to break blockade.

To this proposal to exempt private property from capture at sea Great Britain is, curiously enough, the only serious opponent. Our trade is the largest in the world. We are still very largely both the constructors of ships and the carriers for the world. Our shipping is equal to that of all the rest of the world put together. Consequently we should suffer more than any other Power from

[1] Maine, "Int. Law," 101.
[2] U. S. Statutes at Large, Vol. XVII, 850.

all the dangers, interruptions, and annoyances which beset maritime carriage. Thus, in spite of our naval superiority, our trade might be seriously injured, if not almost wholly checked by even a weak opponent.

On the other hand, it is argued that owing to the enormous growth of insurance and its cosmopolitan character, the loss would be widely diffused, and so far as it fell on this country would chiefly affect the well-to-do classes, unless the war was of a protracted nature. But even the advocates of this theory are obliged to admit that if the war were very protracted, and our navy was too much occupied elsewhere to protect our trade, the loss to this country would be too enormous to contemplate. The losses inflicted by the "Alabama" and her sister ships are a sufficient indication of the danger of a few fast light-armed privateers to our numerous and widely scattered mercantile marine.

These differences of views may not be without practical embarrassment to both Powers if, unfortunately, they should be brought into conflict. An English publicist writes:—

"They (the United States) retain the practice of privateering; but should they avail themselves of it under the old law, they would clearly not be entitled to invoke any of the provisions of the new law in their own favour, and the same power might, of course, be used by their adversary. So, too, as to the principle which affords to enemy's property at sea the protection of the neutral flag; the United States have acquired no right to invoke it against this country. It would rest in the option of England either to adhere to the old rules of maritime warfare in a war with the United States or to maintain the principles of the Declaration of Paris."[1]

Lawfully Commissioned.—What constitutes a lawful commission has occasionally given rise to great difficulties. Strictly, a commission can only be granted by the Government of an independent State, but a concession has been made in practice by virtue of which in the case of civil war vessels sailing under the flag of either of the two belligerents are held to be entitled to *jura belli*, so that they cannot be treated as pirates by the public ships of neutral Powers. For instance, after the revolt of the Low Countries, not only Spain, but other Powers refused to recognize the Letters of Marque issued by the Prince of Orange upon the ground that he had no admiralty jurisdiction.

Upon his nomination as Admiral of the United Provinces in 1576, however, his Letters were recognized as binding by the neutral Powers, although Spain continued for some time to treat the *sea-beggars* as pirates.

Again, in the civil war in Mexico, the "Invincible," sailing under the flag of the newly constituted Republic of Texas, in the

[1] "Edinburgh Review," CCXXXIII, Art. 10.

month of April, 1836, captured the American brig "Pocket," carrying contraband for the Mexican army. She was thereupon captured by the American ship of war "Warren" and brought into New Orleans for condemnation as a pirate. In his report to the President the Attorney-General of the United States declared that—

"When a civil war breaks out in a foreign nation, and part of such nation erect a distinct and separate Government, and the United States, although they do not acknowledge the independence of the new Government, *do yet recognise* the existence of a civil war, our Courts have uniformly regarded each party as a belligerent nation in regard to acts done *jure belli*. Such may be unlawful when measured by the Law of Nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States, but the parties concerned are not treated as pirates. It is true that when persons acting under a commission from one of the belligerents makes a capture ostensibly in the right of war, but really with the design of robbery, they will be held guilty of piracy. In this present case there is not the least reason to believe that the capture was made with any criminal intent."[1]

After the burning of Colon by the Columbian insurgents, the brigantine "Ambrose Light,"[2] commissioned by the rebels as a Columbian ship of war, being overhauled and searched by the United States gunboat "Alliance" on 3 June, 1885, for the purpose of finding Preston, by whose orders Colon had been fired, to the great loss and injury of American subjects, was seized under the United States naval regulations for not carrying a proper commission.

Neutral merchantmen under convoy of ships of war of their own nation not exempt from visit and search.—The claim to exemption has been a matter of controversy since 1653, when Sweden, during the war between England and the United Provinces, asserted that its merchantmen sailing under convoy were exempt from search. Various attempts were subsequently made by the United Provinces, Russia, Sweden, and Denmark to introduce this principle, and the numerous treaties concluded by the majority of the Powers conclusively show that prior to their execution no such exemption existed at Common Law.

Great Britain has consistently maintained the older view, and has instructed her naval commanders that—

"No vessel is exempt from the exercise of these powers on the ground that she is under the convoy of a neutral public ship."[3]

[1] "Opinions of the Att.-Gen. U.S.," Vol. III, p. 120.
[2] 25 Fed. Rep., 408 (1885).
[3] Holland, "Admiralty Manual of Prize Law," p. 2.

On the other hand, France, Russia, Germany, Austria, Spain, Italy, Denmark, and Sweden provide by their naval regulations that the declaration of the commanding officer of the convoying ship shall be accepted as a guarantee that the vessels under his charge are not engaged in illicit traffic.

The decisions of the American Courts and the opinions of American jurists support the English view. The question was first raised in the case of the "Nancy"[1] in 1796, which was a neutral vessel laden with neutral cargo and captured when under enemy convoy. It was there held that the presence of a convoy is constructive resistance and a denial of the right of search, which authorizes seizure and consequent condemnation.

In the "Elsebe"[2] one of the questions was whether the cargoes belonging to subjects of the Hans Towns laden on board Swedish vessels and sailing under Swedish convoy were liable to condemnation. It was contended on their behalf that they were not involved in the penalties of Swedish resistance, which was an Act of the Swedish Government and did not bind the subjects of other Powers; that the proprietors of these cargoes were not privy to this fact, and that the masters of the vessels were not the agents of the vessels so as to bind them.

Sir William Scott, after stating that there was in the charter party an express stipulation *that the ship should proceed under convoy*, says:—

"But I will take the case on a supposition that there was no such engagement. The master associates himself with a convoy, the instructions of which he must be supposed to know; he puts the goods under unlawful protection, and it must be presumed that this is done with due authority from the owners and for their benefit. It is not the case of an unforeseen emergency happening to the ship at sea, where the fact itself proves the owners to be ignorant and innocent, and when the Court has held, that being proved innocent by the very circumstances of the case, they shall not be bound by the new principle of law which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done *antecedently* to the voyage, and must therefore be presumed to be done on communication with the owners and with their consent; and the effect of this presumption is such that it cannot be permitted to be averred against, inasmuch as all the evidence must come from the suspected parties themselves, without affording a possibility of meeting it, however prepared. The Court has therefore thought it not unreasonable to apply the strict principle of law, in a case not entitled to any favour, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, that he has acted under powers from his employer, and that if he has exceeded his authority, it is barratry, for which he is personally answerable, and for which the

[1] 27 C. Cls. R. 99.
[2] 5 Rob., 174 (1804).

owner must look to him for indemnification. I pass over many considerations which have been properly pressed in argument, but I cannot omit to observe that this is not merely a question arising on a single act of limited consequence; it is a pretension of great extent, being nothing less than an opposition to the general law of search, by which, if it could in one instance be admitted, the whole provisions of the Law of Nations on that head might be effectually defied; for if this principle could be maintained by an interchange of convoys the whole unlawful business might be carried on with security. To put the goods of one country on board the ships of another would be a complete recipe for the goods with a trifling alteration, easily understood and easily practised, whilst the mischief itself would exist in full force."

The American view has been expressed nowhere more clearly than by Mr. Justice Story in the "Nereide,"[1] which was a non-commissioned armed British ship chartered by Mr. Pinto, a Spaniard, for a voyage from London to Buenos Ayres and back. It was a term of the charter party that the vessel should be navigated at the expense of the owner and should sail under British convoy. The "Nereide" sailed with her cargo (part of which was the property of Pinto and part the property of British subjects) under British convoy and with Pinto on board. In the course of the voyage the "Nereide" became accidentally separated from the convoy, and whilst endeavouring to regain it was, after a vigorous but unsuccessful resistance, captured by the privateer "Governor Tompkins," and brought into New York for adjudication.

It must be observed that Pinto took no part in the navigation of the vessel, nor in the resistance at the time of the capture.

Upon these facts Mr. Justice Story asked whether Pinto, *assuming him to be a neutral, had so incorporated himself with the enemy interests as to forfeit that protection which the neutral character would otherwise have afforded him?*

From the well-established rule that neutral goods on board enemy ships (provided they are not contraband) are privileged, it has, says the learned judge, been attempted to be inferred that "no distinction can exist, whether the ship be armed or unarmed, or be captured with or without resistance." Such an inference cannot be drawn from the mere silence of the jurists upon this point. The question must be determined "upon a just application of the principles which regulate neutral as well as belligerent rights and duties."

"It is a clear maxim," proceeds Mr. Justice Story, "of National Law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become

[1] 9 Cranch, pp. 436–448.

auxiliary to the enterprises or acts of either, he forfeits his neutral character—nor is this all. In relation to his commerce he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if with a view to resist it he take the protection of an armed neutral convoy, he is treated as an enemy and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belong to the same or a foreign neutral sovereign—for upon the principles of natural justice a neutral is justly chargeable with the acts of the party which he voluntarily adopts or of which he seeks the shelter and protection. *Qui sentit commodum sentire debet et onus*—these principles are recognized in the memorable cases of the 'Maria'[1] and the 'Elsebe,'[2] and can never be shaken without delivering over to endless controversy and conflict the maritime rights of the world."

The learned judge then deals with the argument that although resistance by a *neutral* convoy is unlawful and may incriminate the whole of the associated ships, yet since resistance by a belligerent convoy is lawful a forfeiture cannot flow from an act which is strictly justifiable.

"The fallacy of the argument," answers the learned judge, "consists in assuming the very ground in controversy, and in confounding things in their nature entirely distinct. An act perfectly lawful in a belligerent may be flagrantly wrongful in a neutral. A belligerent may lawfully resist search; a neutral is bound to submit to it. A belligerent may carry on his commerce by force; a neutral cannot. A belligerent may capture the property of his enemy on the ocean; a neutral has no authority whatever to make captures. The same act, therefore, that with reference to the rights and duties of the one may be tortious, may with reference to the rights and duties of the other be perfectly justifiable. The act then, as to its character, is to be judged of, not merely by that of the parties, through whose immediate instrumentality it is done; but also by the character of those who, having co-operated in, assented to or sought protection from it, would yet withdraw themselves from the penalty of the act. It is analogous to the case at Common Law where an act justifiable in one party does not from that fact alone shelter his coadjutor. They must stand or fall upon their own merits. It would be strange indeed, if because a belligerent may resist search a neutral may co-operate to make it effectual. It is therefore an assumption utterly inadmissible that a neutral can avail himself of the lawful act of the enemy to protect himself in an evasion of a clear belligerent right.

"And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not that there is a direct and immediate co-operation in the resistance, because

[1] 1 Rob., 340. [2] 5 Rob., 173.

the case supposes the contrary. It is not that the resistance of the convoy of the sovereign is deemed an act to which all his subjects consent, because the ships of foreign subjects would then be exempted. It is because there is a constructive resistance resulting in law from the common association and voluntary protection against search under a full knowledge of the intention of the convoy. Then the principle applies as well to a belligerent as to a neutral convoy? For it is manifest that the belligerent will at all events resist search; and it is quite as manifest that the neutral seeks belligerent protection with an intent to evade it. Is it that an evasion of search, by the employment of protection or terror of force, is inconsistent with neutral duties? Then a fortiori the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinant and the search more perilous.

"There can be but little doubt that it is upon the latter principles that the penalty of confiscation is applied to neutrals. The law proceeds yet farther, and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance. In this respect it applies a rule analogous to that in cases of blockade when the act of sailing with an intent to break a blockade is deemed a sufficient breach to authorize confiscation. And Sir W. Scott manifestly recognizes the correctness of this doctrine in the 'Maria,' although the circumstances of that case did not require its vigorous application.

"Indeed, in relation to a neutral convoy, the evidence of an intent to resist as well as of constructive resistance is far more equivocal than in case of a belligerent convoy. In the latter case it is necessarily known to the convoyed ships that the belligerent is bound to resist, and will resist until overcome by superior force. It is impossible, therefore, to join such convoy without an intention to receive the protection of belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. It is an adoption of his acts and an assistance of his interests during the assumed voyage. To render the convoy effectual protection it is necessary to interchange signals and instructions, to communicate information and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent, and performs, as to him, a meritorious service—a service little reconcilable with neutral duties, as the agency of a spy, or the friend of a bearer of hostile despatches. In respect to a neutral convoy the inference of constructive co-operation and hostility is far less certain and direct. To condemn in such case is pushing the doctrine to a great extent, since it is acting upon the presumption which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy and intimately blended their own interests with hostile assistance.

. . . . . .

"And this doctrine," continues the learned judge, "seems conformable to the sense of other European sovereigns. In the recent cases of the American ships captured while under British convoy by the Danes, the right of condemnation was not only asserted and enforced by the highest

tribunal of prize, but expressly affirmed by the Danish sovereign after an earnest appeal made by the Government of the United States. On that occasion the Danish Minister pressed the argument 'that he who causes himself to be protected by that act (i.e. enemy convoy) ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of a friend to him against whom he seeks the protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain under the protection of English ships of war without any risk," and he further declared that none of the Powers in Europe have called in question the justice of this principle.[1] To the argument that a party, neutral as to one Power and an enemy as to another Power, may lawfully place himself under belligerent convoy in order to escape from his own enemy, the learned judge answers that in such a predicament it is always open to the neutral to explain his conduct in taking convoy, and to show by proofs his innocent intentions as to all friendly belligerents, but that such a state of facts would not, in his judgment, remove a single difficulty.

"It is not," he argues, "in relation to enemies that the question as to taking convoy can ever arise. It has reference only to the rights of friendly belligerents; and these rights remain precisely the same whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of that a neutral might lawfully resist the right of search of one Power because he was at war with another? And is not the evasion of this right just as injurious whether the neutral be at peace with all the world or with a part only?

"There would be extreme difficulty in establishing by any disinterested testimony the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would, in effect, be an attempt to repel by positive testimony a conclusive inference of law flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under convoy, he shows an intention to avail himself of its protection under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced than by the overt act of quitting convoy. And it is impossible to conceive that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy, unless courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be vain to administer justice in such courts if mere statements of intentions would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great whatever might be the special objects of the neutral. The right of search is effectually prevented by the presence of superior force or exercised only after the perils and injuries of victorious warfare. And it is this very evasion of the right of search that constitutes the ground of condemnation in ordinary cases. The neutral, in effect, declares he will not submit to search until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral then could not, if

[1] U.S. State Papers, 1811, p. 527.

proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in the 'Maria' and 'Elsebe,' and was instantly repelled by the court."

The learned judge therefore held upon this point—

"That the act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable; and, further, that if resistance be necessary—as, in his opinion, it is not—to perfect the offence, still that the resistance of the convoy is to all purposes the resistance of the associated fleet.

"It might with as much propriety," he added, "be maintained that neutral goods, guarded by a hostile army in their passage through a country, or voluntarily lodged in a hostile fortress for the avowed purpose of evading the municipal rights and regulations of that country, should not in case of capture be lawful plunder (a pretension never yet asserted) as that neutral property on the ocean should enjoy the double protection of war and peace."

To the argument that a belligerent ship has an undoubted right to take the protection of the convoy of the nation to which she belongs, and that this extends a perfect and lawful immunity to the neutral cargo on board, the learned judge answers that—

"It is not true that a neutral can shelter his property from confiscation behind an act lawful in a belligerent. The law imputes to the neutral the consequences of the act, if he might have foreseen and guarded against it, or if he voluntarily adopts it. Was it ever supposed that a neutral cargo was protected from seizure by going in a belligerent ship to a blockaded port? or that contraband goods belonging to a neutral were exempted from confiscation because on board of such a ship bound on a voyage lawful to the belligerent but not to the neutral? Yet the pretensions in those cases seem scarcely more extravagant than that now urged. Why should a neutral be permitted to do that indirectly which he is prohibited from doing directly? Why should he aid the enemy by giving extraordinary freight for belligerent ships sailing under belligerent convoy with the avowed intention of escaping from search, and often with the concealed intention of aiding belligerent commerce, and yet claim the benefits of the most impartial conduct? Until some more solid ground can be laid for the distinction than the ingenuity of counsel has yet suggested, it would seem fit to declare *ita lex non scripta est*."

Directions to resist visitation.—A direction to resist visitation and search given by the sovereign of the neutral State to the commanders of his vessels, whether armed or unarmed, whether under convoy or not, affords no protection against the penalties provided by International Law for unlawful resistance to visitation and search.

In the "Maria,"[1] one of the first Swedish convoy cases, Sir William Scott clearly laid it down that the authority of the

[1] "Maria," 1 Rob., 340; "Elsebe," 4 Rob., 408.

sovereign of the neutral country being interposed in any manner of force cannot legally vary the rights of a lawfully-commissioned belligerent cruiser.

Two sovereigns may unquestionably agree by special covenants that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, but no sovereign can legally compel the acceptance of such a security by force.

Apart from such a covenant, the only security known to the Law of Nations is the right of personal visitation and search to be exercised by those who have the interest in making it. Another instance is the statute of 25 June, 1798, passed by the United States Legislature authorizing the commanders and crews of merchant vessels "to oppose and defend against any search, restraint or seizure, which shall be attempted upon such vessels" by the commander or crew of any armed vessel sailing under French colours.

In the case of the "Nancy,"[1] which was tried shortly afterwards, it was argued that this statute authorized resistance by United States merchantmen to French visitation and search, but it was there held that "no single State can change the Law of Nations by its municipal regulations."

Hautefeuille is entirely opposed to the English view, which, he says, is founded upon a false basis. The right of visit is, he contends, a creation of conventional law. He admits that Wheaton supports the English view, but he considers that he does not represent American opinion. "La plupart des publicistes," he says, "ont adopté la doctrine du droit secondaire; ils regardent que le privilége du pavillon d'un bâtiment de guerre ou d'état neutre s'étend au navires convoyés, et que l'affirmation de l'officier commandant suffit, et fait preuve complète de la nationalité des navires aussi que de l'innocuité de leur chargements."[2]

Ortolan, however, merely states the substance of the English and American decisions, without expressly stating his own opinion.[3] He does, however, indicate his own view in the following passage:—

"Nous croyons, conformément à l'opinion de plusieurs auteurs eminents, que l'immunité d'un navire de guerre, en ce qui concerne la visite, se communique à bon droit aux bâtiments de commerce de sa nation, naviguant

[1] 27 Court of Claims, 99; see also "The Ship 'Rose' *v.* United States," 36 C. of Cl., 291.

[2] Des Nations Neutres, liv. XI, ch. III, sec. 2.

[3] "Diplomatie de la Mer," Vol. III, ch. VII.

sous son escorte et sous sa protection. Vérifier la neutralité des navires, s'assurer qu'ils n'ont à bord aucune contrebande de guerre et lorsque l'on suit le principe 'le pavillon ne couvre pas la marchandise,' reconnaitre s'ils ne portent pas de marchandises ennemis—tels sonts les droits incontestables des belligérants."

Right of search limited to duration of the war.—In the suppression of the slave trade by Great Britain and other countries, the restriction of the right of visit to time of war caused much inconvenience, and Great Britain, as we have seen, attempted to set up a distinction between the right of visit and the right of search. It was argued that the right of visit might be exercised in time of peace so far as to ascertain the nationality of the vessel suspected of carrying on this inhuman trade. This right was claimed as late as 1841, when Lord Aberdeen, in a despatch to the American minister, asserted the right to visit vessels suspected of being engaged in the slave trade, but this claim was abandoned in 1858, when it was declared in the House of Lords that—

"On receiving the unanimous opinion of the law officers of the Crown, Her Majesty's Government at once acted, and we frankly confessed that we had no legal claim to the right of visit and of search which has hitherto been assumed."

Why, in face of Sir William Scott's judgment in 1817, such a claim should ever have been assumed is very remarkable.

In his exhaustive judgment, Sir William declared that this exemption rested upon two fundamental principles of public law. First, the principle of the perfect equality and entire independence of all distinct States; secondly, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for this navigation. He could, he continued, find no authority giving the right of interruption to the navigation of States in amity upon the high seas, excepting that which the rights of war gave to both belligerents against neutrals. A desirable end must not be accomplished by unlawful means.

"To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other States in Europe; in short, to procure an eminent good by means that are unlawful is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance, by example, by every procurable instrument which man can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force. Nor is it

to be argued that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one State or its subjects may inconsiderately adopt for its attainment."[1]

Exception to right of visitation and search.—Where a belligerent cruiser grossly abuses its power, resistance in self-defence may lawfully be made by a neutral ship.

"How stands it," asked Sir William Scott in the "Maria,"[2] "by the general law?"

"I don't say," he answered, "that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself (and an armed vessel has not a right to say for it), 'I will submit to no such inquiry, but I will take the law into my own hands by force.' What is to be the issue if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed as often as there is anything like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained?"

Right of visitation and search limited by treaty: convoy.—That the right of visitation and search belongs to every belligerent by International Law, and cannot be varied by the interposition of any municipal law of any neutral Power, is incontestable. But there is nothing to prevent two or more Powers agreeing between themselves that in case one shall be at war, the presence of the ships of war of the other along with their merchantmen shall be mutually understood to imply that nothing is to be found in that convoy of merchantmen inconsistent with amity or neutrality. Or if the mere presence is not considered a sufficient guarantee, that the word of the commander of the neutral ships of war shall be accepted as a pledge of right conduct.

By Art. XX of a treaty of peace between Oliver Cromwell and the United Provinces, in 1652, it was provided that the ships of war of either State should take into their protection and under convoy all ships belonging to the other State as long as they steered the same course.[3]

In the war between England and Holland in 1653, Queen Christina of Sweden instructed the commanders of her merchant vessels to take every advantage of convoy, and ordered such convoying ship to resist by force every attempt on the part of

[1] "Le Louis," 2 Dod. at pp. 243–257.
[2] 1 Rob., pp. 373–4. [3] "Sea Laws," 3rd ed., p. 541.

belligerents to visit the merchantmen under their protection. This ordinance, however, was never put into operation, as the war was of too short a duration.

The treaty with Cromwell probably explains the contention of Holland, in the succeeding war between Great Britain and Spain, that her merchant vessels under convoy were exempt from visitation. At any rate, an English squadron contented itself with the bare word of De Ruyter, that the vessels under his convoy conveyed nothing belonging to the King of Spain. But whenever she was a belligerent, Holland claimed the right to visit merchant vessels under neutral convoy, although she supported the action of Captain Deval in 1762, and of Admiral De Byland in 1780, in forcibly resisting the attempt of English men-of-war to visit merchant vessels under their convoy.

No reference to this exemption was made in the Armed Neutrality of 1780, although in 1781 the Swedish man-of-war, "Wasa," resisted the attempt of a British cruiser to visit a merchantman under her protection. Thus attention was once more drawn to this question. By Art. X of the treaty between the United States and the States General it was agreed that the ship's papers of vessels under convoy should not be demanded, but that the word of the officer commanding the convoy should be deemed sufficient.[1]

Similar stipulations were contained in Art. XVIII of the treaty between Russia and Denmark of 1782[2]; in Art. XII of the treaty between the United States and Sweden of 1783[3]; in Art. XIV of the treaty between the United States and Prussia of 1785[4]; in Art. XXXI of the treaty between France and Russia of 1787[5]; in Art. XX of the treaty between Russia and the Two Sicilies of 1787[6]; in Art. IV of the treaty between the United States and Morocco of 1787[7]; in Art. XXV of the treaty between Russia and Portugal of 1787[8]; in Art. V of the treaty between the United States and Tunis of 1797[9]; in Art. XIX of the treaty between the United States and France of 1800[10]; and more particularly in the convention of the Armed Neutrality of 1800.

Thus by the end of the eighteenth century the principle of exemption had been recognized by all the principal maritime powers except Great Britain, who, in fact, always protested against the claim. In 1798, for instance, a fleet of Swedish merchant vessels, sailing under convoy of a man-of-war, was

[1] De Martens, "Rec.," III. 437. [2] *Ibid.*, 475. [3] *Ibid.*, 571.
[4] *Ibid.*, IV. 43, renewed in 1799. [5] *Ibid.*, 212. [6] *Ibid.*, 238.
[7] *Ibid.*, 249. [8] *Ibid.*, 328, renewed in 1738.
[9] U.S. Statutes at Large, Vol. VIII, 157. [10] *Ibid.*, 178.

seized on resistance being made, and the captured vessels condemned by the English prize court.[1]

In the spring of 1800, a Danish frigate, convoying merchantmen, resisted the search of some British frigates near Gibraltar, which led to diplomatic correspondence between the two Powers. Count Bernstorff contended that the right of search was merely conventional, and thus could not be extended without express agreement. Great Britain replied that the right of search was a natural right, and the fact that stipulations were included in numerous treaties since 1780 supported the validity of the old rule, and proved the novelty of the exemption and its want of legality.

Abandoning this line of argument, Count Bernstorff then maintained that the right of search was based upon the necessity of ascertaining the nationality of merchant vessels, and of examining their papers; that if the latter were found in order no further search could lawfully take place, and that consequently it was the authority of the Government, in whose name the documents were signed, which secured to a belligerent the required assurances. Now a neutral Government, in causing her vessels to convoy merchant vessels, offers to belligerents a much more positive and authentic guarantee than that which is usually taken as sufficient evidence—suspicion of fraud could not attach without injurious reflection on the neutral Power.[2]

Shortly after this correspondence occurred the affair of the "Freya," a Danish frigate in charge of six merchant vessels, which was met in the Channel by six British cruisers. A demand for search was refused, and after the exchange of shots a short action ensued, in which the Danish frigate surrendered, and with the convoy was carried as prize to the Downs.

By the treaty of 29 August, 1800, a compromise was arrived at. The right to exemption was left for future discussion, and meanwhile the King of Denmark agreed to suspend his convoys. The Danish vessels were released, and the "Freya" repaired. Meanwhile the convention of the Second Armed Neutrality of $\frac{16}{17}$ August, 1800, had been signed, whereby it was agreed that the declaration of the officer commanding a convoy that the merchantmen under his protection had no contraband on board should suffice to prevent any visit taking place either to his ship or to the ships convoyed. This convention was ratified by Sweden, Denmark, and Prussia before the end of the year.

Upon the assassination of the Emperor Paul, amicable relations were renewed between Great Britain and Russia, and by

[1] The "Maria," 1 Rob., 340; *ante*, p. 328.
[2] Manning, "Law of Nations," pp. 441–3.

the treaty of 17 June, 1801,[1] in return for the abandonment by Russia of the principle that "free bottoms make free goods," Great Britain recognized the principle that the presence of ships of war should exempt merchant vessels under their protection from visitation and search.

The following are the stipulations :—

"Art. I. That the right of visiting merchant vessels belonging to the subjects of one of the contracting Powers and sailing under the convoy of a ship of war of the said Power, shall only be exercised by the ships of war of the belligerent party, and shall never be extended to privateers, cruisers, or other vessels not belonging to the Imperial or Royal Navy of their majesties, but equipped by their subjects.

"Art. II. That the proprietors of all merchant vessels belonging to the subjects of one of the contracting parties and intended to sail under the convoy of a ship of war, shall be obliged, before they receive their sailing orders, to produce to the commander of the convoy their passports and certificates or sea-letters, in the form annexed to the present treaty.

"Art. III. That when such ship of war, having merchant vessels under convoy, shall be met by a ship or ships of war of the other contracting party, being then in a state of war, to avoid all disorder the ships shall remain beyond cannon-shot distance, unless the state of the sea or the place of meeting render a nearer approach necessary; and the commander of the ships of the belligerent party shall send a boat to board the ship of the convoy, when there shall take place a mutual verification of papers and passports, which ought to state, on the one side, that the neutral ship of war is authorized to take under her escort such and such merchant vessels of her nation, laden with a specified cargo and proceeding to a specified port; and on the other hand stating that the ship of war of the belligerent belongs to the Imperial or Royal Navy of their majesties.

"Art. IV. This examination having been made, no further search shall take place if the papers are found to be regular and if there exists no valid ground for suspicion. In the contrary case, the commander of the neutral ship of war, having been duly required to do so by the commander of the ship or ships of the belligerent, shall bring to and detain his convoy during the time necessary for the search of the vessels which compose it; and he shall have the power of naming and delegating one or more officers to assist in the search of the merchant vessels, which search shall take place in their presence on board such merchant ship conjointly with one or more officers appointed by the commander of the ship of war of the belligerent Power.

"Art. V. Should it happen that the commander of the belligerent ship of war, having examined the papers found on board, and having questioned the master and crew of the vessel, shall perceive just and sufficient reasons for detaining a merchant ship, in order to proceed to a further examination, he shall notify this intention to the officer in command of the convoy, who shall have the power of ordering an officer to remain on board the vessel so detained and assist in the examination of the cause of

[1] De Martens, "Rec.," VII, 260.

her detention. The merchant vessel shall be immediately conducted to the nearest and most convenient port belonging to the belligerent party; and the further examination shall take place with all the despatch possible."

By Art. VI it was agreed that if any vessel under convoy be detained unduly, the commander of the belligerent should be obliged not only to recompense the proprietors of the ship and cargo for all loss, charges, damages, and expenses, but also should be liable to punishment for any act of violence or fraud. On the other hand, the convoying ship was not, on any pretext whatever, to oppose by force the detention of any suspected vessel by the belligerent, although this obligation did not extend to the conduct of a ship of convoy towards a privateer.

The convention was acceded to by Denmark[1] and Sweden.[2] It was annulled in 1807.

Since the peace of 1815 the exemption from search of ships under convoy has, except in the case of Great Britain, usually been provided for by treaty.

France.—By her treaty with Peru of 9 March, 1861, it was provided that a vessel under the convoy of an armed public ship of the neutral State should not be subject to visitation if the commander of the convoy verbally gave his word of honour that she belonged to his country, and if destined to a hostile port carried no contraband or property of the other belligerent, and was not engaged in illicit intercourse.[3]

German Empire.—By the regulations issued to the German navy, and contained in the Prussian Royal Decree of 20 June, 1864, neutral vessels under convoy of neutral men-of-war are not to be subjected to visitation, and the declaration of the commander of the convoy that the papers of the convoyed vessels are in order, and that there is no contraband on board, is to be accepted.[4]

United States.—In the case of the United States, both before and after the peace, this exemption is generally to be found in her treaties with the Powers. The simple declaration of the officer commanding the convoy that the vessels under his protection belong to the nation whose flag he carries, and that when bound to an enemy's port they carry no contraband, is deemed sufficient.

Such stipulations are contained in the treaty with Sweden of

[1] De Martens, "Rec.," VII, 273.
[2] *Ibid.*, 276.
[3] De Clerq, 201, Art. XXIII.
[4] "Rev. de Droit Int.," X, 238.

3 April, 1783[1]; in the treaty with France of 30 September, 1800[2]; in the treaty with Columbia of 3 October, 1824; in the treaty with Brazil of 12 December, 1828; in the treaty with Mexico of 5 April, 1831; in the treaty with Chile of 16 May, 1832; in the treaty with the Peru-Bolivian Confederacy of 13 November, 1836; in the treaty with Venezuela of 20 January, 1836; in the treaty with Ecuador of 13 June, 1839[3]; in the treaty with New Granada of 12 December, 1846[4]; in the treaty with Guatemala of 3 March, 1849[5]; in the treaty with Peru of 26 July, 1851[6]; in the treaty with San Salvador of 2 January, 1850[7]; in the treaty with Bolivia of 13 May, 1858.[8]

In the treaty with Venezuela of 27 August, 1860, in addition to the usual agreement that the verbal declaration of the commander of the convoy should suffice, both parties agreed not to admit under the protection of their convoys, ships which should have on board contraband goods destined to an enemy.[9] In the case of the slave trade in the treaty with Great Britain of 7 April, 1862, it was provided by Art. II, 3, that if any merchant vessel under convoy should be suspected of carrying slaves, the commander of the cruiser of the other Power should communicate his suspicions to the commander of the convoy, and the two commanders should make a joint visit and search, and if the suspicions appeared well founded, the suspected vessel should be sent in for adjudication to the nearest mixed court.[10]

In the treaty with the Dominican Republic of 8 February, 1867,[11] the provision is precisely similar to that in the treaty with Venezuela.

By the convention with Great Britain of 3 June, 1870,[12] the provisions of 1862 relating to mixed courts were annulled. The usual provision only appears in the treaties with Italy of 26 February, 1871,[13] with the Republic of Peru of 6 September, 1870,[14] and with the Republic of Salvador of 6 December, 1870.[15]

Russia.—It has been seen how by her treaty of 5 June, 1801, with Great Britain, Russia abandoned, so far as this Power was concerned, her pretension to resist the exercise of the belligerent right of search of merchant vessels under convoy, although this abandonment was modified inasmuch as this right was limited to public ships of war, and was prohibited to privateers.

In her numerous treaties with other States—for instance, with

[1] De Martens, "Rec.," VII, 52.
[2] *Ibid.*, 484.
[3] See also Statutes at Large, U.S.A., Vol. VIII, 188, 316, 395, 420, 438, 478, 495, 544.
[4] *Ibid.*, Vol. IX, 893.
[5] *Ibid.*, Vol. X, 12.
[6] *Ibid.*, 42.
[7] *Ibid.*, 76.
[8] *Ibid.*, Vol. XII, 303.
[9] *Ibid.*, Vol. XII, 217.
[10] *Ibid.*, 280.
[11] *Ibid.*, Vol. XV, 484.
[12] *Ibid.*, Vol. XVI, 777.
[13] *Ibid.*, Vol. XVII, 854.
[14] *Ibid.*, XVIII, 710.
[15] *Ibid.*, 736.

France and Portugal in 1787—the same formalities of visit and search have been uniformly stipulated. In the case of vessels without a convoy, ships of war are not to approach merchant vessels nearer than half a cannon's shot, and not more than two or three men are to go on board to examine the passports and sea-letters which disclose the property in the cargoes. And for the better prevention of mistakes there are reciprocal undertakings to transmit copies of the formal parts of such documents.

In the case of vessels under convoy of one or more ships of war, the mere declaration of the officer in command that there is no contraband on board the vessels is to be accepted as sufficient, and the vessels are to be allowed to continue their course.[1]

Italy.—By Art. 218 of the Mercantile Marine Code, neutral vessels under convoy of ships of war are free from the exercise of the right of visit. The declaration of the commander of the visiting cruiser is sufficient to authenticate the flag and the nature of the cargo of the ships under convoy.[2]

[1] "Rev. de Droit. Int.," Vol. X, 614-615.
[2] Raikes' "Maritime Codes of Italy," 180.

CHAPTER VI

FORMALITIES OF VISIT AND SEARCH

THE right of visit and search has been recognized in numerous treaties, and the formalities to be observed have been frequently described.

The approach.—In the majority of the older treaties it is provided that the visiting ship shall remain beyond cannon shot; in others, at cannon shot; whilst some permit approach to within half a cannon shot. "One can see at once," says Ortolan, "that these clauses have not been drawn by sailors. There are circumstances depending on the state of the wind and the sea in which it would be unpardonable for a commander to risk a boat and its complement of men for such a distance as a cannon shot, and still more for a greater distance."[1]

It is, however, quite as probable that this rule of a cannon shot or more was fixed in the early times of artillery, when guns were of a very short range.

To-day the general rule, as expressed by treaty, is that the visiting ship shall approach not nearer than a cannon shot, and shall send a boat with not more than two persons besides the boat's crew, which two persons shall go on board and inspect the ship's papers, of which the form is usually settled by the treaty.

It was alleged in the "Marianna Flora,"[2] that by the law of nations and the recognized custom of every maritime nation on the continent of Europe that the visiting ship was bound to show her national flag and to affirm it by firing a gun. To fly the flag merely was not sufficient. As Azuni says, "The fear of meeting with a pirate and being the dupe of deceitful appearances is the reason why no credit is given to the *flag* of a vessel, though a ship of war."[3]

This ceremony, called the *semonce*, *coup de canon d'assurance*, or affirming gun, was no doubt the general practice in former days.[4]

Lampredi, indeed, is of opinion that it is no longer a matter of mere conventional law, but may be regarded as an established

[1] Liv. III, c. VII.
[2] 11 Wheat. 1 (1826).
[3] 2 Azuni, 204, 602, c. 3, sec. 3.
[4] Hautefeuille, Liv. III, XI, 515.

usage, that after the flag of a belligerent cruiser has been hoisted as a signal for a merchant vessel to shorten sail, it must be immediately affirmed by a gun fired with blank cartridge, and that the cruiser must not approach near enough to cause any apprehension of other than peaceful intentions on its part.[1]

In delivering the judgment of the court in the "Marianna Flora,"[2] Story J. declined to accept this as a universal rule.

"We are not disposed to admit," he observed, "that there exists any such universal rule or obligation of an affirming gun as has been suggested at the Bar. It may be the law of the maritime States of the European continent already alluded to, founded in their own usages or positive regulations. But it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise; and surely, as a maritime Power, England deserves to be listened to with as much respect, on such a point, as any other nation."

The States referred to in the argument were those of Spain and Portugal. But although this ceremony is not considered to be a rule of international law by the English or American courts, and is not the municipal law in either of those countries, yet it appears to be the usual custom in practice.

"The usual mode," says Halleck, "adopted by most of the maritime Powers of Europe, of summoning a neutral to undergo visitation is the firing of a cannon on the part of the belligerent. It is undoubtedly the duty of the neutral to obey such a summons; but there is no positive obligation on the belligerent to fire such *an affirming gun*; for its use is by no means universal. Moreover, any other method, as hailing by signals, etc., of summoning a neutral to submit to an examination may be equally as effective and binding as the *affirming gun* if the summons is actually communicated to and understood by the neutral. The means used are not essential, but the fact of a summons actually communicated is necessary to acquit the visiting vessel of all damages which may result to the neutral disobeying it."[3]

The distance of approach is also not yet settled either by a rule of international law or by custom. The stipulation of a cannon's shot or half a cannon's shot still continues to appear in modern treaties, but the long range of modern guns renders the stipulation impracticable. Moreover, the natural distrust of armed vessels when piracy was rife and privateering universal has almost disappeared.

The visiting ship may sail under false colours whilst giving chase, but must not fire until she has hoisted her national flag. In the case of the "Peacock,"[4] an English privateer chased and

[1] "Du Commerce des Neutres," sec. 12.
[2] 9 Wheat., 39.
[3] "Int. Law," Vol. II, 287.
[4] 4 Rob., 185 (1802).

fired upon an American ship under French colours, in consequence of which letters directed to friends in London, which might have betrayed the real destination to a French captor, and have led to condemnation in a French court, were thrown overboard.

"To sail and chase under false colours," said Sir William Scott, "may be an allowable stratagem of war, but firing under false colours is what the maritime law of this country does not permit, for it may be attended with very unjust consequences; it may occasion the loss of lives of persons who, if they were apprised of the real character of the cruiser, might, instead of resisting implore protection."

To assume the guise of a friend or an enemy in war is an act of familiar and frequent occurrence.

"It is so ordinary a *ruse de guerre*," said Johnson J. in the "Eleanor,"[1] "that it ought rather to be expected than the display of real colours. And innumerable cases that have come before this court prove that in the actual state of things during the late war it became as necessary to practise the deception upon our citizens as upon a neutral or an enemy. We therefore see nothing reprehensible in this."

But as Hautefeuille points out, the neutral is entitled as of right to know the nationality of the belligerent vessel before she submits to a visit, and so no force must be used, such as firing a gun blank or otherwise, before the belligerent has declared her nationality.[2] Lampredi[3] and Azuni[4] both emphasize this point. The former writes:—

"D'après l'usage et les diverses conventions établies à cet égard, il est passé en loi général de guerre aujourd'hui que le pavillon arboré par les belligérants ne doit inspirer aucune confiance quand il n'est pas assuré d'un coup de canon à poudre, signe par lequel le capitaine assure que le pavillon ou bannière qu'il arbore est réel."

Whilst the latter says:—

"Voila pourquoi on est généralement convenu de ne pas obéir à l'appel d'un vaisseau armé en guerre avant le coup d'assurance, c'est-à-dire avant que, par un coup de canon à poudre le commandant n'ait pas certifié la sincérité et la loyauté de son pavillon."

Great Britain.—The following rules are based upon those prepared by the late Mr. Godfrey Lushington, and revised by Professor Holland, for the use of naval officers in time of war. They are not now issued to the public, but they may still be taken as substantially representing the modern practice, and may therefore be usefully reproduced here in a slightly altered form. The original numbers to the rules have been retained.

[1] 2 Wheat., 245 (1817). [2] Liv. III. XI, 516.
[3] "Du Commerce des Neutres," secs. 12.
[4] "Droit Mari. de l'Europe," Vol. II, c. III, Art. IV, secs. 3, 4.

The approach.—195. When a vessel suspected to be lawful prize is sighted, the commander should, with a view to any claims of joint capture that may be raised by himself or other captors, appoint an officer to observe and note in writing from time to time the following particulars:—

1. **At the time the vessel is sighted.**—Where and when the vessel was first sighted; at what distance and in what direction she was from the ship; and what course the vessel was pursuing; whether any other British or allied ship-of-war was in sight, and if so, at what distance, and in what direction from the vessel and what course such ship was pursuing.

2. **During the continuance of the chase.**—Whether any and what alteration took place in the course of the vessel; whether any other British or allied ship-of-war came in sight, and if so, when and where, and at what distance, and in what direction from the vessel, and what course such ship was pursuing, and whether she joined in the chase, and if so, to what extent.

3. **At the capture.**—When and where the vessel was brought to; and

(*a*) If the commander is the actual captor; whether any other British or allied ship-of-war was in sight at the time, and if so, at what distance and in what direction such ship-of-war was from the vessel, and what course such ship was pursuing.

(*b*) If such other British or Allied cruiser is the actual captor, then at what distance, and in what direction the commander's ship was from the vessel, and what course his ship was pursuing.[1]

The visit.—The usual modern practice is for the visiting ship to send a boat with an officer in charge alongside the merchant vessel. No one but the officer and an assistant-officer are to go on board for the purpose of examining the ship's papers.[2]

According to some jurists, the commander of the belligerent vessel may content himself with summoning, or rather inviting, the captain of the suspected vessel to come on board the belligerent vessel and bring his papers with him for examination.

The decision of the Supreme Court of the United States in the "Eleanor"[3] has been cited in support of this statement. In this case the boarding officer ordered the master of the "Eleanor" to go on board the belligerent cruiser with one of his mates.

"It was contended," said Johnson J., "that the master of the 'Eleanor' ought not to have been removed from his vessel; that the right of search only authorized the sending of an officer on board to examine her papers. But we think otherwise. The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. To divest her of both her principal officers, without putting on board her, for the time, a competent officer and crew, would certainly be irregular. But it is for the interest of the commercial world that the investigation should be made by the commander himself, and not left to any subordinate officer. In that case it would be absurd to require of the commander of the commissioned vessel to quit his command for the purpose of making the necessary examinations."

[1] Holland, "Manual of Naval Prize Law," 60 (1888).
[2] Heffter, sec. 169. [3] 2 Wheat., 362 (1817).

In practice, however, the United States depart from this theory, as following treaties bear evidence. These are, with Bolivia, 13 May, 1858[1]; with Venezuela, 27 August, 1860[2]; and with the Dominican Republic, 8 February, 1867[3]; with the Republic of Peru, 6 September, 1870[4]; with the Republic of Salvador, 6 December, 1870[5]; with Italy, 26 February, 1871,[6] in all of which—

"It is expressly agreed that the neutral party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers or for any other purpose whatever."

In Denmark, by the law of 13 February, 1864, sec. 13, the commander of a public armed ship may summon the master of a merchant vessel, not under convoy, to come on board his ship with his papers. If these are found *en règle*, then he is to be free to continue his voyage.[7]

Similar regulations are contained in the Royal Decree of Prussia of 20 June, 1864, which are now in force in the German navy. It is further provided that if upon inspection of the papers any serious cause for suspicion arises, an officer should be sent on board to make a full inquiry into all the circumstances.[8]

This practice is condemned by MM. de Pistoye and Duverdy, inasmuch as it is open to objections both from the point of view of the belligerent and the neutral. On the one hand, the former may be deceived by false papers, which he is unable to verify, and the latter is exposed to the possible retention of documents without which he would run the risk of seizure at the hands of another belligerent cruiser.[9]

In order to meet these objections, in the treaty between France and the United States, 30 September 1800,[10] it was expressly agreed by Art. XVIII that the neutral vessel should not be constrained to send an officer on board the belligerent cruiser for the purpose of exhibiting his papers or for any other examination whatever.

The following rule, which is to be found in so many treaties, is contained in the *Règlement des Prises Maritimes* proposed by the Institute of International Law:—

"Le navire arrêté ne pourra jamais être requis d'envoyer à bord du navire de guerre son patron ou une personne quelconque, pour montrer ses papiers ou pour tout autre cause."

[1] Statues at Large, U.S., Vol. XII, 302.
[2] *Ibid.*, 217.
[3] *Ibid.*, Vol. XV, 484.
[4] *Ibid.*, Vol. XVIII, 710.
[5] *Ibid.*, Vol. XVIII, 735.
[6] *Ibid.*, Vol. XVII, 85.
[7] "Rev. de Droit Int.," X, 214.
[8] *Ibid.*, 238.
[9] Vol. I, 237.
[10] U.S. Statutes at Large, Vol. VIII, 188.

But if by reason of the state of the sea or some other cause it is impracticable for the visiting ship to send a boat immediately, it appears to be a universal practice for the commander to order the vessel to lower her flag and steer according to his commands.

The "Edward and Mary,"[1] for instance, an English vessel, was ordered by a French privateer to lie to, as owing to the boisterous state of the weather the latter was unable to send a boat. In this case Sir William Scott refers to the case of a British vessel armed with two swivels, but with only three men on board, which overawed a French privateer row-boat full of armed men, and compelled it to proceed to Ostend, then the port of an ally, she following at a safe distance astern.

So, too, upon the outbreak of hostilities between China and Japan, the sinking of the "Kowsing," because she refused to obey the directions of the commander of the Japanese cruiser "Naniwa," was perfectly justifiable. The "Kowsing" was a neutral ship engaged in transporting 1200 Chinese troops with several generals. The captain was asked whether he would peaceably follow the "Naniwa" to Japan. He replied, "Yes; I am powerless to refuse, as you are a man-of-war." The Chinese officers, however, declined to allow this to be done, and made preparations for shooting the captain and his English officers should any attempt be made to take the ship to Japan. With the large body of troops on board it was, of course, impossible for the "Naniwa" to place a prize crew on the "Kowsing," so after more attempts to induce the latter to obey the directions, the Japanese vessel fired a torpedo and a broadside, which resulted in the "Kowsing" going to the bottom.

Great Britain. The visit.

"196. In exercising the right of visit, the commander should be careful not to occasion to the neutral any delay or deviation from her course that can be avoided, and generally to cause as little annoyance as possible.

"197. The commander may chase, but under no circumstances may fire, under false colours.

"198. The commander should not in any case require a boat to be sent from the vessel, or any person or papers to be brought from her on board his ship.

"199. If the state of the wind and weather permit, the commander should communicate his intention to visit by hailing, and then cause his ship to go ahead of the suspected vessel and drop a boat alongside of her.

"200. If the state of the wind and weather render such a course impracticable, the commander should require the vessel to be brought to. For this purpose he should give warning by firing successively two blank guns,

[1] 3 Rob. 305 (1801).

and then, if necessary, a shot across her bows; but before firing, the commander, if he has chased under false colours, should be careful to hoist the British flag and pendant.

"201. If these measures fail to cause the vessel to bring to, then, but not till then, the commander will be justified in resorting to coercion.

"202. When the vessel has been brought to, the commander should send a boat alongside.

"203. A second officer should (if convenient) accompany the visiting officer, and should be instructed to observe carefully everything that occurs during the visit, in order that, if required, he may give evidence.

"204. The visiting officer and the officer by whom he is accompanied should be in uniform, and the boat should carry a British flag.

"205. The only persons who should in the first instance go on board the vessel, are the visiting officer and his subordinate; none of the crew should be allowed to quit the boat unless expressly ordered. If found necessary, they should be ordered on board.

"206. If the visiting officer, upon boarding, is at once satisfied that the vessel is not liable to detention, he should immediately quit her.

"207. If not so satisfied, he should demand, but with all proper courtesy, to see the vessel's papers. In case of refusal, he should insist upon their production; in the last resort he will be justified in adopting coercive measures; but it is important so far as possible to avoid any exercise of force.

"208. The visiting officer should be careful to obtain the name of the vessel correctly. He should not be content with taking it from the mouths of the master and crew, but should observe how the name is written in her papers and painted on her stern and boats.

"209. If after examining the vessel's papers the visiting officer is satisfied that she is not liable to detention, he should immediately quit her.

"210. Before quitting the vessel, the visiting officer should ask the master whether he has any complaint to make of the manner in which the visit has been conducted or on any other ground. If the master makes any complaint, the visiting officer should request him to specify the particulars in writing.

"211. The visiting officer should enter on the log-book of the vessel a memorandum of the visit. The memorandum should specify the date and place of the visit and the name of His Majesty's ship and of the commander; and the visiting officer should sign the memorandum, adding his rank in the Navy.

"212. A similar memorandum should be made on that document amongst the vessel's papers which may be supposed to determine her nationality.

"213. Immediately on his return to his ship, the visiting officer should draw up a statement of his proceedings while the facts are fresh in his memory, specifying whether any complaint was made by the master or any other person on board the vessel, and if so, the nature of the complaint. He should also deliver to the commander any complaint which the master may have made in writing, and the commander should thereupon carefully investigate the case, and should lose no time in applying such remedy as circumstances may demand.

"214. The subordinate officer should also draw up in detail and deliver to the commander a statement of all the facts which he witnessed.

"215. The commander should see that a proper entry of all the necessary particulars is made in the boarding-book, and the log-book should be signed by the officer by whom the visit was made.

"216. The commander should by the first opportunity forward a full report of the case, together with his own remarks thereon, to the senior officer on the station; and a duplicate thereof to the Secretary of the Admiralty."[1]

Ship's papers.—Every merchant vessel is expected to carry on board some official documents vouching for her nationality, describing the nature of her cargo, and stating her port of departure and her destination. The official voucher of nationality of a vessel belonging to a State which possesses a register of its mercantile marine, is known as a certificate of registry. Where there is no such register, the form of the document varies, and is called a passport, sea-letter, or sea-brief.

The certificate of registry is signed by the Registrar of the port to which the vessel belongs, and usually contains the name of the vessel and of the port, her tonnage, etc., the name of her master, particulars as to her origin, and the names and description of her registered owner.

The passport is a document issued by a neutral State or by the State to which the vessel belongs, granting a free passage to the vessel with her crew, passengers, goods, and merchandise without hindrance, molestation, or seizure at the hands of the subjects of such State. It usually contains the name and residence of the master, and the name, description, and destination of the vessel.

The sea-letter or sea-brief is a document issued by the civil authorities of the port at which the vessel is fitted out. It entitles the master to sail under the flag and pass of the nation to which he belongs. It also specifies the nature and quantity of the cargo, its ownership, and destination.

The charter-party is a statement in writing of the contract under which the vessel is hired for the current voyage. The hirer is called the charterer. It is executed by the owner or master and by the charterer. It usually contains the name of the master, the name and description of the vessel, the port where she is lying at the time of the charter, the name and residence of the charterer, the nature of the cargo to be put on board, the port of lading, the port of delivery, and the freight which is to be paid. This document is almost invariably on board.

[1] Holland, "Manual of Naval Prize Law," 61–64.

The official log-book is the book which the master is compelled to keep in the form prescribed by the municipal law of the country to which the vessel belongs.

The ship's log is the book kept by the master in the interests of the owner.

The builder's contract ought to be found on board a vessel which has not changed hands since she was built. It is not a necessary document, but it may serve, in the absence of a certificate of registry, passport, or sea-letter, to identify a vessel.

The bill of sale is the instrument by which the vessel is transferred to a purchaser. It should be demanded wherever a sale of the vessel is alleged to have been made either during the war or just prior to its commencement, and there is any reason to suspect that the vessel is liable to detention either as an enemy vessel or as a British or allied vessel trading with the enemy.

Bills of lading usually accompany each lot of goods. A bill of lading on board a vessel is the duplicate of the document given by the master to the shipper of the goods upon shipment. It contains the name of the shipper, the date and place of shipment, the name and destination of the vessel, the description, quantity, and destination of the goods, and the freight which is to be paid.

The invoices should always accompany the cargo. They contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, with the names and addresses of the shippers and consignees.

The manifest is a list of the vessel's cargo containing the mark and number of each separate package, the names of the shippers and consignees, a specification of the quantity of the goods contained in such package, e.g. rum, sugar, sail-cloth, etc.; and also an account of the freight corresponding with the bills of lading. The manifest is usually signed by the ship-broker who clears the vessel out at the custom-house, and by the master.

The clearance is the certificate of the custom-house authorities of the last port from which the vessel sailed, to show that the custom duties there had been paid. The clearance specifies the cargo and its destination.

The muster roll contains the name, age, quality, place of residence and of birth of every member of the crew.

Shipping articles are the agreements of hiring of the members of the crew. They should be signed by each member, and should describe accurately the voyage and the terms for which each member ships.

Bill of health is the certificate issued by the civil authorities of the last port from which the vessel sailed, that such port was

free from contagious disease, and that none of the crew at the time of her departure were infected with such disease.[1]

The following is a list of the papers carried by vessels of the chief maritime Powers as evidence of their nationality, and other papers which ought to be found on board.

Austria :—

Royal Licence (Patente sovrana).
Certificate of Registry (Scontrino ministeriale).

Other papers carried—
Official Log-book (Giornale di navigazione).
Ship's Log-book (Scartafaccio, giornale di navigazione cotidiano).
Manifest of Cargo.
Bills of Lading.
Muster Roll (Ruolo dell' equipaggio).
Bill of Health.
Charter-party, if vessel is chartered.

Belgium :—

Sea-letter (Lettre de mer), available for four years.
Muster Roll (Role d'equipage).
Certificate of Registry (Régistre de certificat de jaugeage).
Log-book.
Manifest of Cargo.
Bills of Lading (Les connaissements).
Acte de Propriété.
Charter-party, if vessel is chartered.

Brazil :—

Certificate of Registry (Carta de Registro).
Special Pass (Passe especial), issued to vessels purchased by Brazilians out of the Republic, by the Brazilian Legation or Consulate of the place, and constituting provisional proof of nationality.
Passport (Pasaporte).
Muster Roll (Roll de equipagém).
Manifest of Cargo.
Bills of Lading.
Log-book (?)

Denmark :—

Certificate of Registry (Registrerings certifikat).

[1] Holland, "Manual of Naval Prize Law," 47–51.

Denmark—*continued.*

Provisional Certificate of Registry (issued by the Government of the Danish Antilles, by the Governor of Iceland, or by the Sheriff of the Faroe Islands).
Provisional Certificate of Registry (issued by a Danish consul abroad).
Muster Roll (Liste).
Manifest of Cargo.
Bills of Lading.
Log-book.
Charter-party, if vessel is chartered.
In addition to one of the above-mentioned documents, every Danish vessel is required by law to have the mark of nationality, D.E. (Dansk Eigndom), i.e. Danish Property, the numerals indicating the tonnage and the signal letters, distinctly marked on the main beam or on some other conspicuous place in the ship.

France:—

Certificate of Nationality (Acte de Francisation), with particulars from the Acte de Propriété endorsed on it, or
Provisional Certificate of Nationality (Acte de Francisation Provisoire).
Sailing Licence (Congé).
Muster Roll (Rôle d'équipage).
Inventory of ship's furniture, fittings, and stores.
Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.
"Acquits-à-caution" are only required of French vessels arriving at one French port from another French port.

German Empire:—

Certificate of Nationality (Schiff's certifikat).
Provisional Certificate of Nationality (Flaggen attest).
Certificate of Measurement for decked steamers (Schiff's messbrief).
Certificate of Measurement for decked sailing vessels.
Provisional Certificate of Measurement for steamers and sailing vessels.
Muster Roll (Musterrolle).
Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Great Britain :—

Certificate of Registry; or
Provisional Certificate granted by a consul resident in a foreign country to a vessel purchased there. This is available for six months. A pass granted to a vessel before registration, enabling her to go from one port to another within the British dominions, has the force of a certificate.
Muster Roll.
Official Log-book.
Ship's Log-book.
Shipping Articles.
Manifest of Cargo.
Bill of Health.
Bills of Lading.
Charter-party, if vessel is chartered.

Greece :—

Certificate of Nationality.
Congé or Passport.
Inventory of ship's furniture, fittings, and stores.
Certificate of Tonnage (Procès-verbal du jaugeage).
Muster Roll with Shipping Articles.
Description of visits to which ship has been subjected (Procès-verbal).
Log-book.
Bill of Health.
Coasting Licence for vessels of five tons and under.
Livre des emprunts à la grosse.

Holland :—

Sea Letter (Zeebrief).
Provisional Sailing Licence (Voorloopige zeebrief).
Extraordinary Sailing Licence (Buitengewone zeebrief).
Certificate of Measurement (Meetbrief voor zeeschepen) for interior and exterior measurement.
Proof of Ownership (Bijlbrief).
Muster Roll.
Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Italy :—

Certificate of Nationality (Atto di Nazionalità).
Muster Roll (Ruolo d'Equipiggio).

Italy—*continued.*

Certificate of Measurement (Certificato di Stanza) for decked vessels.
Official Log-book.
Ship's Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Portugal:—

Proof of Ownership (de propriedade).
Ship's Passport (Pasaporte Real).
Muster Roll.
Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Norway:—

Certificate of Nationality (Nationalitets bevis).
Provisional Certificate of Nationality may be granted by a consul of Sweden or Norway in a foreign port, for a vessel brought there by a Norwegian subject, to allow the ship to be taken direct to a Norwegian port. The consul, by application to his Government, can issue this document for a longer period.
Certificate of Registry, if built in Norway.
Certificate of Tonnage (Maalebrev).
Muster Roll (Bemandings Liste).
Log-book.
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Russia and Finland:—

Russia—

Ship's Licence or Commission.
Certificate of Tonnage.
Temporary Certificate of Tonnage.
Passport.
Muster Roll or Shipping Articles.
Manifest of Cargo.
Charter-party, if vessel is chartered.

Finland—

Certificate of Tonnage (Matebref).
Certificate of Build (Bilbref).
Muster Roll or Shipping Articles (Sjomansrulla).
Log-book (?)
Charter-party, if vessel is chartered.

Spain:—

Ship's Passport (Real Patente).
Certificate of Registry (Certifico).
Ship's Articles (Rol de Navegacion).
Log-book (Cuarderno de Vitacora).
Manifest of Cargo.
Bills of Lading.
Charter-party, if vessel is chartered.

Sweden:—

Certificate of Nationality (Fribref).
Provisional Certificate.
Certificate of Nationality (Fribref).
Certificate of Build (Bilbref).
Certificate of Measurement (Mätbref). } One document.
Muster Roll (Sjomansrulla).
Ship's Log-book (Journalen).
Manifest of Cargo.
Passport from a Chief Magistrate or Commissioner of Customs.
Bills of Lading.
Charter-party, if vessel is chartered.

Turkey:—

(1) Diary or Log-book.
(2) Navigating licence, with its annex.
(3) Licence for seamen, with its annex.
(4) Manifest, with its annex and the form of receipt of the fees to be paid.
(5) Form of receipt for harbour fees to be paid at Constantinople.
(6) Licence given by the harbour-master to ships of less than five tons burden.
(7) Form of receipt for lighthouse dues.
(8) Form of receipt for the fees paid for lifeboat service established at the entrance of the Black Sea.
(9) Bill of health.
(10) Form of receipt for sanitary fees.

Nos. 5, 7, 8, 9, and 10 are accompanied by French translations.

United States:—

Certificate of registry or
Provisional Certificate of Ownership issued by United States consuls to citizens of the United States purchasing vessels in a foreign port.
Sea Letter (occasional).
Shipping Articles.
Muster Roll.
Permit to touch and trade—issued to licensed fishing vessels intending to touch at places out of the United States.
Manifest of Cargo.
Log-book.
Bills of Lading.
Charter-party, if vessel is chartered.

In the treaties of the United States with the republics of Peru (6 September, 1870) and Salvador (6 December, 1870) it is agreed that when one of the parties shall be engaged in war the vessels of the other must be furnished with sea-letters, patents, or passports (letras de mar, patentes ó pasaportes), in which shall be expressed the name and burden of the vessel, and the name and place of residence of the owner and master or captain thereof. It is also agreed that, in addition to these documents, the vessels shall be provided with manifests or certificates containing the particulars of the cargo and the place where it was taken on board, in order that it may be known whether any part consists of contraband or prohibited articles. This certificate is to be made out in the accustomed form by the authorities of the port from which the vessel has sailed. In the absence of these documents, the vessel may be detained and confiscated, unless such omission or defect shall be proved to be accidental.[1]

The following rule relating to the papers which ought by law to be found on board is included in the "Règlement des Prises Maritimes" proposed by the Institute of International Law:—

"1. Les documents relatifs à la propriété du navire;
"2. Le connaissement;
"3. Le rôle d'équipage, avec l'indication de la nationalité du patron et de l'equipage;
"4. Le certificate de nationalité, si les documents mentionnés sous le chiffre 3 n'y suppléent;
"5. Le journal de bord."[2]

[1] Statutes at Large, U.S., Vol. XVIII, 710, 735.
[2] "Ann. de l'Inst.," 1883, 217.

If upon examination the ship's papers appear to be in order, and there are no extraneous circumstances to arouse suspicion, the visiting officer must immediately withdraw, and the vessel must be allowed to proceed forthwith on her course.

The absence of due conformity to the formalities of visit and of observance of the regulations issued by the State of the visiting ship does not invalidate the capture, provided it is proved to the satisfaction of the court that a sufficient cause for seizure did in fact exist.[1]

The search.—But if, on the contrary, the ship's papers upon examination afford intrinsic evidence of *mala fides*, or if from any other circumstance, such as the failure of the vessel to shorten sail when signalled to do so, any opposition to the visitation, any attempted concealment, destruction, or jettison of papers, any suspicious conduct of the master or of the crew, then the vessel may be subjected to a more minute examination either of documents or of the officers or members of the crew, or other persons on board, or of the cargo.

Some jurists, indeed, limit the right of examination to that of the papers produced. Thus, for instance, Hautefeuille would permit no further investigation even when the visiting officer doubts, or professes to doubt, the genuineness of the papers or the truth of their contents. To search for further papers, to interrogate the master and crew, or to investigate the nature of the cargo, he considers an abuse of the right of visitation—acts wholly unauthorized, and which neutrals are entitled to resist by force.[2]

Lampredi,[3] Azuni,[4] and Ortolan,[5] are of opinion that an examination beyond that of the papers produced, can only take place where there is suspicion of fraud. De Martens[6] and Massé,[7] though in some respects differing in their views, limit the right of search to the single case where the papers are incomplete or irregular.

The right of search naturally implies the duty of submission. But the right of the neutral to freedom of trade, provided it does not infringe the belligerent's right of war, is of equal value to the right of search. Thus, although it is the duty of the neutral, however innocent his pursuit may be, to submit to the lawful visitation and search, and all acts rendered necessary in their accomplishment, the belligerent must not abuse his right. This right must not only be lawful, but it must also be exercised in a

[1] Dalloz, "Juris. Gen. Ann.," 1855, III, 73.
[2] "Droits Des Nations Neutres," tit. XII.
[3] "Commerce des Neutres," sec. 12.
[4] "Droit Marit.," c. III, Art. IV.
[5] "Dip. de la Mer," liv. III, c. VIII.
[6] "Essai sur les Armateurs," c. II.
[7] "Droit Com.," liv. II, tit. II, c. II.

lawful and reasonable manner. The right, says Halleck, is limited to such acts as are necessary to a thorough examination into the real character of the vessel, the nature of her cargo, and her destination, and all acts which transcend the limits of this necessity are unlawful.[1]

It was held in the "Rose"[2] that a neutral is justified in offering forcible resistance to visit and search where extreme violence is threatened by a cruiser grossly abusing its commission.

Great Britain. The search.

"217. If after an examination of the ship's papers the visiting officer suspects that she may be liable to detention, he should proceed to search her.

"218. When the search has been authorized, the boat's crew should be called on board to assist, and if necessary further assistance should be obtained from the cruiser.

"219. The visiting officer is entitled to make inquiries from the master and crew, but must abstain from all threats and intimidation.

"220. During the search, neither the master nor any other person should be removed from the vessel without his consent.

"221. Care should be taken to prevent any irregularity or any damage to the cargo.

"222. If in the course of the search the visiting officer is satisfied that the vessel is not liable to detention, the search should be immediately discontinued; everything which has been removed should be replaced as quickly and carefully as possible, and the vessel allowed to pursue her course without delay.

"223. If the visiting officer finds on board any ship's papers relative to another vessel already captured, but not adjudicated upon, he should take possession of them and forward them to that port to which such vessel has been sent in for adjudication.

"224. Before quitting the vessel, the visiting officer should ask the master whether he has any complaint to make of the manner in which the search has been conducted, or on any other ground. If the master makes any complaint, the visiting officer should request him to specify the particulars in writing.

"225. The visiting officer should enter on the log-book of the vessel a memorandum of the search. The memorandum should specify the date and place of the search, and the name of His Majesty's ship, and of the commander. The visiting officer should sign the memorandum, adding his rank in the navy.

"226. A similar memorandum should be made on that document amongst the vessel's papers which may be supposed to determine her nationality.

"227. Immediately on his return to his ship, the visiting officer should draw up a statement of his proceedings while the facts are fresh in his memory, specifying whether any complaint was made by the master

[1] "Int. Law," Vol. II, 286.
[2] 36 Ct. Cl. 290.

or any other person on board the vessel, and if so, the nature of the complaint. He should also deliver to the commander any complaint which the master may have made in writing, and the commander should thereupon carefully investigate the case, and should lose no time in applying such remedy as circumstances may admit.

"228. The officer who accompanied the visiting officer should also draw up in detail and deliver to the commander a statement of all the facts he witnessed.

"229. The commander should see that a proper entry of all the necessary particulars is made in the boarding book, and also in the log-book of the ship. Both should be signed by the officers by whom the search was conducted.

"230. The commander should, at the first opportunity, forward a full report of the case, together with his own remarks thereon, to the senior officer on the station, and a duplicate thereof to the Secretary of the Admiralty."[1]

Spain.—The following instructions, drawn in accordance with Art. V of the Royal Decree of 23 April, 1898, were issued on the following day to the President of the Council of the Fleet :—

Instructions for the exercise of the right to visit.

"1. Right of visit can only be exercised by belligerents; hence it can evidently be only resorted to during international conflicts by one or other of the States at war, as also during internal, civil, or insurrectionary war, when one or more foreign Powers have recognized the insurrectionary party as belligerents. In such circumstances right of visit can be exercised by the mother country, but it is restricted to the merchant vessels of the nation or nations who have given this recognition, and who are for such reason in the position of neutrals.

"2. In accordance with the position laid down in the preceding article, ships of war and merchant vessels of the belligerents, when legally armed either as auxiliary cruisers of their navy or as privateers if and when they are authorized, may, in their own territorial waters or those under the jurisdiction of the enemy or in the open sea, detain such merchant vessels as they meet with in order to verify the legitimacy of their flag, and if neutrals and proceeding to a port of the other belligerent, the nature of their cargo.

"3. Seas subject to the sovereign jurisdiction of neutral Powers are absolutely inviolable; right of visit may not, therefore, be resorted to within them, even if it be alleged that it was attempted to exercise such right in the open sea, and that on chase being given and without losing sight of the vessel pursued, the latter penetrated into neutral waters.

"Neither may the violation of the rights attaching to such water be justified under the pretext that the coast washed thereby was undefended or uninhabited.

"4. The following is the method of exercising right of visit :—

"(*a*) Notification to the vessel to be visited to lay to and state its nationality is made by the visiting vessel hoisting her national flag and

[1] Holland, "Manual of Naval Prize Law," 65-7.

firing a blank charge, a signal upon which the merchant vessel is bound to hoist the flag of the nation to which it belongs and lay to.

"(*b*) If the merchant vessel does not obey this first intimation, and either refuses to hoist her flag or does not lay to, a second gun will be fired, this time loaded, care being taken that the shot does not strike the vessel, though going sufficiently close to her bows for the vessel to be duly warned; and if this second intimation be disregarded, a third shot will be fired at the vessel so as to damage her, if possible without sinking her. Whatever be the damage caused to the merchant vessel by this third shot, the commanding officer of the man-of-war or captain of the privateer cannot be made responsible. Nevertheless, in view of special circumstances, and in proportion to the suspicion excited by the merchantman, the auxiliary vessel of war or privateer may delay resorting to the last extremity until some other measure has been taken, such as not aiming the third discharge at the vessel, but approaching it and making a fresh notification by word of mouth; but if this last conciliatory measure prove fruitless, force will be immediately resorted to.

"(*c*) The visiting vessel will place herself at such distance as her commander or captain may think convenient from the vessel to be visited, according to circumstances of wind, sea, current, or the suspicion inspired by the said vessel; and if these circumstances make it advisable for the boat about to make a visit to approach on the windward side and to go to leeward on returning, there is no reason why she should not do so.

"But if by existing treaties between the nations to which the vessels respectively belong the distance to be kept is specified, such a clause of conventional law shall be respected if the circumstances of wind, sea, or current above mentioned permit.

"(*d*) The visiting vessel will send to the merchant vessel a boat with an officer, who will effect the visit in question under a verbal commission from his commanding officer; said officer may board the merchant vessel in company with two or three of the crew of the boat, but it will be left to his discretion whether he shall do so or go alone.

"(*e*) The visiting officer will inform the captain of the merchant vessel that, under commission from the commander of the Spanish ship of war or of the auxiliary cruiser [here follows the name of ship of war or auxiliary cruiser] or from the captain of the privateer [here follows name of vessel], he intends to effect a visit, and will request him to produce his sailing-papers, or official document which takes their place, in proof of the nationality of the vessel therein stated being that of the flag which he has hoisted, and to show the port to which the vessel is proceeding.

"Should the first point be satisfactorily proved, and should the port of destination prove to be a neutral one, the visit is thereby concluded.

"But should the vessel be proceeding to a port belonging to the enemy of the nation to which the visiting vessel belongs, the officer will ask the captain of the merchant vessel for the documents in which the nature of the cargo is stated, in order to ascertain if there be contraband of war; should there be none, the visit is definitely concluded, and the neutral vessel is at liberty to proceed on its voyage; but should there be contraband, its capture is proceeded with; but no search may in these circumstances be made.

"5. The visiting officer should have instructions from his commanding officer authorizing the visited vessel to continue her voyage if the visit has

presented no difficulties, in order that the delay may not be longer than is absolutely indispensable.

"6. If the captain of the visited vessel asks to have the visit certified, the visiting officer will accede to his request, and will insert a note in the sheet for the day in the ship's books in the following form:—

"The undersigned [rank in the navy], sailing on the [gunboat, cruiser, etc.] of His Catholic Majesty, named [or the auxiliary cruiser or privateer], whose commanding officer is [rank and name], certifies that this day, at [hour of morning or evening], under a verbal commission from the said commanding officer, he has carried out the visit of the [class of vessel, name and nationality of merchant service], captain [name of captain], and ascertained from the papers shown to him the legitimacy of the flag which she flies and the neutrality of her cargo.

"Date.....

"Signature of visiting officer .....

"Seal of visiting ship.....

"7. The visit will likewise be recorded in the books of the visiting vessel, the following circumstances being stated:—

"(*a*) Details of the intimation or intimations given to the visited vessel.

"(*b*) Hour of its lying to.

"(*c*) Name and nationality of visited vessel and captain thereof.

"(*d*) Manner in which visit was effected and its result, stating name of officer who executed it.

"(*e*) Hour at which vessel was authorized to proceed.

"8. The record of the visit, which, as stated in Art. VI, can be made at the wish of the captain of the visited vessel, will become an indispensable formality should the vessel contain wounded or sick soldiers, subjects of the enemy, for in such a case all such persons will, by the mere act of visit, be incapacitated from bearing arms again during the war, in accordance with the first paragraph of the tenth additional article of the Geneva Convention.

"The visiting officer will therefore in such a case make a notification of the same to the chief of the expeditionary force, and will make a note in the books of the visited vessel in the form prescribed in Art. VI, with the following addition:—

"This vessel contains [number of sick and wounded] individuals [of the army or navy, or both] sick and wounded, subjects of the enemy, all of whom, by the fact of paragraph 1 of the tenth additional article of the Geneva Convention, of which I have made notification to the commander of the expeditionary force, who stated that he was [here follow rank and name].

"9. The visit is not an act of jurisdiction on the part of the belligerent, it is a natural means of legitimate defence allowed by international law, lest fraud and bad faith should assist the enemy. This right should therefore be exercised with the greatest moderation by the belligerent, special care being taken to avoid causing the neutral any extortion, damage, or trouble, that is not absolutely justifiable.

"In consequence of this the detention of the ship visited should always be as short as possible, and the proceedings restricted as far as they can

be, their exclusive object being, as explained, for the belligerent to ascertain the neutrality of the ship, and in case of neutrality (if bound for a port of the enemy) the inoffensive and neutral description of its cargo.

"It is not necessary, therefore, to demand during the visit any other documents than those proving these two conditions, for what the belligerent requires is to prevent any damage, favouring or assisting the enemy; to prevent assistance and help being furnished to them that may contribute directly to the prolongation of the war, and not to be assured that all ships belonging to neutral Powers are provided with all the documents required by the laws of their country."[1]

United States.—The following instructions were issued by the Navy Department on 20 June, 1898, for the information and guidance of the naval service:—

Right of Search.

"12. The belligerent right of search may be exercised without previous notice upon all neutral vessels after the beginning of the war to determine their nationality, the character of their cargo, and the ports between which they are trading.

"13. This right should be exercised with tact and consideration, and in strict conformity with treaty provisions wherever they exist. The following directions are given, subject to any special treaty stipulations. After firing a blank charge and causing the vessel to lie to, the cruiser should cause a small boat, no larger than a whale boat, with an officer to conduct the search. There may be arms in the boat but the men shall not wear them on their persons. The officer wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality, and her ports of departure and destination. If she is neutral and trading between neutral ports, the examination goes no further. If she is neutral and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war the vessel should be seized; if not she should be set free, unless by reason of strong grounds of suspicion a further search should seem to be requisite.

"14. Irrespective of the character of the cargo or of her purported destination, a neutral vessel should be seized if she—

"(1) Attempts to avoid search by escape; but this must be clearly evident.
"(2) Resists search with violence.
"(3) Presents fraudulent papers.
"(4) Is not supplied with the necessary papers to establish the objects [of search.
"(5) Destroys, defaces, or conceals papers.

"The papers generally to be expected on board of a vessel are—

"(1) The Register.
"(2) The Crew List.
"(3) The Log-book.
"(4) A Bill of Health.
"(5) A Charter-party.
"(6) Invoices.
"(7) Bills of Lading.

[1] Papers. Foreign Relations, U.S., 1898, 775.

"15. A neutral vessel carrying hostile despatches, when sailing as a despatch vessel in the service of the enemy, is liable to seizure; but not when she is a mail packet and carries them in the regular and customary manner, either as a part of the mail in her mail bags, or separately as a matter of accommodation, and without special arrangement or remuneration. The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.[1]

"16. A neutral vessel in the service of the enemy in the transportation of troops or military persons is liable to seizure."

Projet de Règlement des Prises Maritimes—L'Institut de Droit International, 1882–1887 :—[2]

1. *De l'arrêt.*

Sec. 10. Les navires de guerre d'un état belligérant sont autorisés à arrêter, dans les cas prévus par le règlement, tout navire de commerce ou privé qu'ils rencontrent dans les eaux de leur état ou en haute mer, et ailleurs qu'en des eaux neutres ou soustraites aux faits de guerre.

Sec. 11. Le navire de guerre du belligérant pour inviter le navire de commerce à s'arrêter, se servira comme signal d'un coup de canon de semonce à boulet perdu ou à poudre. Avant ou en même temps, le navire de guerre hissera son pavillon au-dessus duquel en temps de nuits, un fanal sera placé. A ce signal, le navire arrêté hissera son pavillon et se mettra en panne pour attendre la visite. Le navire de guerre enverra alors au navire arrêté une chaloupe montée par un officier accompagné d'un nombre d'hommes suffisant, dont deux ou trois seulement monteront avec l'officier à bord du navire arrêté.

Sec. 12. Le navire arrêté ne pourra jamais être requis d'envoyer à bord du navire de guerre son patron ou une personne quelconque, pour montrer ses papiers ou pour tout autre cause.

Sec. 13. Le navire de commerce est obligé de s'arrêter; il lui est interdit de continuer sa route. S'il le fait néanmoins, le navire de guerre a le droit de la poursuivre et de l'arrêter de force.

2. *De la visite.*

Sec. 14. Le droit de visite s'exerce dans les eaux des belligérant, en tant qu'elles ne sont pas mises par traité à l'abri des faits de guerre, et en haute mer; il s'exerce à l'égard des navires de commerce, mais non à l'égard des navires de guerre d'un état neutre, ni à l'égard d'autres navires appartenant ostensiblement à un tel état, ni à l'égard des navires de commerce neutres qui sont convoyés par un navire de guerre de leur état.

Sec. 15. Le droit de visite s'exerce, soit en vue de vérifier la nationalité d'un navire arrêté, soit pour constater s'il fait un transport interdit, soit pour constater une violation de blocus.

Sec. 16. Lorsque des navires de commerce neutres sont convoyés, ils ne seront pas visités, si le commandant du convoi remet au navire du belligérant qui l'arrête une liste des navires convoyés, et une declaration

[1] Instructions of Navy Department, 20 June, 1898. Foreign Relations of the United States, 1898, 781.

[2] "Revue de Droit Inter.," Vol. XIX, 147.

signée par lui et portant qu'il ne se trouve à leur bord aucune contrebande de guerre, et quelles sont la nationalité et la destination des navires convoyés.

Sec. 17. Lorsque le navire à visiter est un paquebot-perte, il ne sera pas visité si le commissaire du gouvernement dont il porte le pavillon, se trouvant à son bord, déclare par écrit que le paquebot ne transporte ni des dépêches ni des troupes pour l'ennemi, ni de la contrebande de guerre pour le compte ou à destination de l'ennemi.

Sec. 18. La visite, à laquelle doit se soumettre tout navire qui n'en est pas exempt en vertu des dispositions des Articles 16 et 17, commence par l'examen des papiers de bord du navire arrêté. Si ces papiers sont trouvés en règle ou s'il ne se présente rien de suspect, le navire arrêté peut continuer sa route. Pourront de même continuer leur route les navires neutres destinés à des expéditions scientifiques, à condition qu'ils observent les lois de la neutralité.

3. *De la recherche.*

Sec. 19. Si les papiers de bord ne sont pas en ordre, ou si la visite opérée a fait naitre un soupçon fondé, comme il est dit en l'article qui suit, l'officier qui a opéré la visite est autorisé à procéder a la recherche. Le navire ne peut s'y opposer ; s'il s'y oppose néanmoins, la recherche peut être opérée de force.

Sec. 20. Il y a soupçon fondé dans les cas suivants :—

1. Lorsque le navire arrêté n'a pas mis en panne sur l'invitation du navire de guerre ;

2. Lorsque le navire arrêté s'est opposé à la visite de cachettes supposées recéler des papiers de bord ou de la contrebande de guerre ;

3. Lorsqu'il a des papiers doubles, ou faux, ou falsifiés ou secrets, ou que ses papiers sont insuffisants, ou qu'il n'a point de papiers ;

4. Lorsque les papiers ont été jetés à la mer ou détruits de quelque autre façon, surtout si ces faits se sont passés après que le navire a pu s'apercevoir de l'approche du navire de guerre ;

5. Lorsque le navire arrêté navigue sous un pavillon faux.

Sec. 21. Il n'est pas permis aux personnes qui sont chargées d'opérer la recherche d'ouvrir ni de rompre des armoires, réduits, caisses, cassettes, tonnes, futailles ou autres cachettes, pouvant renfermer une partie de la cargaison, ni d'examiner arbitrairement les objets faisant partie de la cargaison que se trouvent répandus à découvert dans le navire.

Sec. 22. Dans les cas de soupçon mentionnés au Sec. 20, s'il n'y a pas de résistance à la recherche, l'officier qui y procède doit faire ouvrir les réduits par le patron, et faire faire la recherche dans la cargaison à découvert sur le navire avec le concours du patron.

CHAPTER VII

CAPTURE AND CONDEMNATION

THE right of capture arises—

1. Where resistance is made to visitation or search.

2. When it is either obvious or there is evidence giving rise to the suspicion that the vessel is engaged in an illicit act, e.g.:

(*a*) Acting as enemy's transport or in the carriage of naval or military officers and crews.

(*b*) Carrying enemy's despatches.

(*c*) Carrying contraband of war.

(*d*) Attempting to break a *de facto* blockade after official notification or with knowledge.

(*e*) Engaging in the colonial or coasting or other close trade of the enemy.

(*f*) Proceeding as a vessel equipped for war to a belligerent.

(*g*) Equipping, furnishing, fitting out, or arming vessels, or allowing the same to be so equipped, furnished, fitted out, or armed for the use of belligerents.

3. Where the ship's papers are false, or are concealed, despoiled, or destroyed with a view to deceive.

1. Resistance to visitation or search.— A neutral private vessel is bound to submit to visit and search by a belligerent cruiser, and the slightest resistance by force will only render it liable to capture, and involve the ship and cargo in condemnation, however innocent they may be in fact.

"I stand with confidence," said Sir William Scott in 1799, "upon all fair principles of reason; upon the distinct authority of Vattel, upon the institutes of other maritime countries, as well as those of our own country, when I venture to lay it down, that by the Law of Nations, as now understood, a deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation."[1]

The "Maria" was one of the merchant vessels, sailing under the convoy of a Swedish cruiser, which resisted the claim of the British cruisers to visitation. In condemning the ship and cargo, Sir William Scott directed all private adventures to be restored.

[1] The "Maria," 1 Rob., 368.

In the "Catherine Elizabeth,"[1] Sir William Scott drew a distinction between resistance by a *neutral* master and an *enemy* master. In this case a French vessel, carrying neutral goods (American), had been recaptured by its French master. A prisoner of war, unless under *parole*, said Sir William,

"had a perfect right to emancipate himself by seizing his own vessel. If a neutral master attempts a rescue, he violates a duty which is imposed upon him by the Law of Nations to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different; no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself he has a right so to do."

The goods were ordered to be restored if they should prove to be American. So far the English and American courts agree; but if a belligerent merchantman should be armed, a difference of opinion has arisen,

The English view is clearly expressed by Sir William Scott in the "Fanny."[2] In this case, during the war between Great Britain and the United States in 1812–14, the "Fanny," having a commission of war on board, but employed also for purposes of commerce, sailed under a British convoy from Liverpool to Rio de Janeiro, and there obtained leave from the admiral on the station to return home without convoy.

Men and guns having been added for the express purpose of enabling the ship to fight her way home, after a severe engagement she was captured by the American schooner "General Armstrong," but shortly afterwards recaptured by H.M.S. "Sceptre."

Part of the cargo was owned by Portuguese merchants. Sir William found as a fact that these merchants, when they put their goods on board, must have known that the vessel was armed.

"A neutral subject," declared the learned judge, "is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent—subject, nevertheless, to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilized States, to condemn neutral property. Neither will the goods of the neutral be subject to condemnation although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. *But if he puts his goods on board a ship of force*, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on

[1] 5 Rob., 232 (1804). [2] 1 Dod., 447–9 (1814).

board a mere merchant vessel; and so far as he does this he adheres to the belligerent; he withdraws himself from his protection of neutrality and resorts to another mode of defence; and I take it to be quite clear that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy. . . . If they (the Portuguese merchants) choose to take the protection of a hostile force instead of their own neutral character, they must take the inconvenience with the convenience; they must abide by the consequences resulting from the course of conduct which, upon the whole knowlege of the matter, they have thought proper to pursue."

On the other hand, the courts of the United States have held that the fact of the vessel being armed does not incriminate the property of neutrals.

The point first came up for decision in the case of the "Nereide,"[1] in 1815. This was an armed British ship chartered by a Spanish subject named Pinto, and laden partly with British goods and partly with neutral goods. She sailed from Liverpool under convoy, and upon separation from her convoy was captured after resistance by an American privateer.

Marshall C.J., in delivering the judgment of the court upon this point, relied upon the old rule of international law which established that—

"The goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored."

The learned judge found as a fact that the vessel had not been armed by Pinto, and that although the latter was on board, he had no control of the ship, and did not direct or take any part in the resistance. But was he entitled as a neutral to put his goods on board an armed belligerent merchantman? This was answered by the court in the affirmative.

"That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean is universally recognized as the original rule of the law of nations. It is, as has been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found.

"Since it is not," says Vattel, "the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country or on board an enemy's ships are to be distinguished from those which belong to the enemy.

"Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration because he enters into the inquiry whether a knowledge of the hostile character of the vessel can affect the owner of the goods.

[1] 9 Cranch, 388.

"The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

"It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

"The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition of self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them.

"A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it?

"By placing property in a belligerent ship, that property according to the positive rules of law does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use, when the rule was laid down, and over which the neutral had no control?

"The belligerent answers that by arming his rights are impaired. By placing his goods under the guns of an enemy the neutral has taken part with the enemy and assumed the hostile character.

"Previous to that examination which the Court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

"It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

"What is this right of search? Is it a substantive and independent right wantonly and in the pride of power, to vex and harass neutral commerce because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licences should be procured. But this is not its character.

"Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a means justified by the end. It has been truly denominated a right growing out of and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search never arises or comes into question.

"But it is said that the exercise of the right may be prevented by the

inability of the party claiming it to capture the belligerent carrier of neutral property.

"And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search? In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means lawful in themselves he can escape this vexatious procedure, he may certainly employ them.

"To the argument that by placing his goods in the vessel of an armed enemy he connects himself with that enemy and assumes the hostile character, it is answered that no such connexion exists.

"The object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has the right so to do. He meddles not with the armament nor with the war. Whether his goods went on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays and the freight he would pay were the vessel unarmed.

"It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

"The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel, and may always occur where the carrier is belligerent.

"It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against them.

"The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this: that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other, that a resistance which is lawful and is not produced by the goods will not change their character.

"The case of the 'Catherina Elizabeth' approaches more nearly to that of the 'Nereide,' because in that case, as in this, there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture there does not seem to be a total dissimilitude. But it is the reasoning of the judge, and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employ-

ment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force, and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that *resistance by a belligerent vessel would not confiscate the cargo.* It is only in a case without express authority that such materials can be relied on.

"If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war; why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the Court to afford a strong argument in favour of the goods. The law would operate in the same manner on both.

"It cannot escape observation that in argument the neutral freighter has been continually represented as arming the 'Nereide' and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The Court does not so understand the case. The 'Nereide' was armed, governed, and conducted by belligerents. With her force or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct passage to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter-party and of her duty.

. . . . . .

"The 'Nereide' has not the centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights and subject to all the dangers of the belligerent character. She conveys neutral property, which does not engage in her warlike equipments or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation—the hazard of being taken into port and obliged to seek another conveyance should its carrier be captured.

"In this, it is the opinion of the majority of the Court, there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Mr. Pinto for himself and his partners and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property be dismissed."

From this judgment Mr. Justice Story strongly dissented. He found as a fact that the "Nereide" sailed under convoy, became temporarily separated from it, and whilst endeavouring to regain it was, after an unsuccessful resistance, captured and brought in for adjudication. Upon this alone he found that Mr. Pinto, assuming

him to be a neutral, had so incorporated himself with the enemy interests, as to forfeit that protection which the neutral character would otherwise afford him. As his arguments on this head have already been dealt with,[1] we may proceed to the point immediately before us. The learned judge considered that the proposition that there is no difference, in point of law, whether the ship has or has not a commission of war, or is or is not armed, required a very full examination.

"In the first place," he said, "it is to be considered whether a neutral shipper has a right to put his property on board an armed belligerent ship without violating his neutral duties. If the doctrine already advanced on the subject of convoy be correct, it is incontestable that he has no such right. If he cannot take belligerent convoy, a fortiori he cannot put his property on board of such convoy; or what is equivalent, on board an armed and commissioned ship of the belligerent. What would be the consequences if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign? That there would be a perfect identity of interests and of objects, of assistance and of immunity between the parties. The most gross frauds and hostile enterprises would be carried on under neutral disguises, and the right of search would become as utterly insignificant in practice as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection would enable the belligerent to keep up armaments of incalculable size, to the dismay and ruin of inferior maritime Powers. Such false and hollow neutrality would be infinitely more injurious than the most active warfare. It would strip from the conqueror all the fruits of victory and lay them at the feet of those whose singular merit would consist in evading his rights, if not in collusively aiding his enemy. *It is not, therefore, to be admitted that a neutral may lawfully place his goods under armed protection on board an enemy ship.* Nor can it be at all material whether such ship be commissioned or not; that is an affair exclusively between a sovereign and his own subjects, but is utterly unimportant to the neutral. For whether the armament be employed for offence or defence in respect to third parties, the peril and the obstruction to the right of search are equally complete. Nor is it true, as has been asserted in argument, that a non-commissioned armed ship has no right to capture an enemy ship except in her own defence. The act of capture without such pretext, so far from being piracy would be strictly justifiable upon the Law of Nations, however it might stand upon the municipal law of the country of the capturing ship. Vattel has been quoted to the contrary, but on a careful examination it will be found that his text does not warrant the doctrine.[2]

. . . . . .

"Admitting, however (what to me seems utterly inadmissible), that a neutral may lawfully ship his goods on board the armed ship of an enemy, it will be of little avail unless he is exempted from the consequences of all acts of such enemy. If the shipment be innocent, it will

[1] See p. 324. [2] See p. 363.

be of little avail in this case if the resistance of the enemy master will compromit the neutral character of the cargo. To the establishment, therefore, of such an exemption the exertions of counsel have been strenuously directed. It has been inferred from the silence of elementary writers, from the authority of analogous cases, and from the positive declarations of the Court in the 'Catherina Elizabeth.'[1]

"The argument drawn from the silence of jurists has been already sufficiently answered. It remains to consider that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true as to neutrals, that the act of the master never binds the owner of the cargo unless the master is proved to be the actual agent of the owner. The act of the master may be, and very often is, conclusive upon the cargo, although no general agency is established. Suppose he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up under the same cover enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They, in general, turn upon a settled distinction, that the act of the master shall not bind the cargo where the act under the circumstances could not have been within the scope or contemplation of the shipper at the time of shipment; or where his ignorance of the voyage and of the intended acts of the master is placed beyond the possibility of doubt.[2] The very case of resistance is a strong illustration of the principle. The resistance of the neutral master has been deliberately held to be conclusive on the neutral cargo.[3] What reason can there be for a different rule in respect to a belligerent master?

"It must be admitted that the language of the Court in the case of the 'Catherina Elizabeth' would at first view seem to support the position of theclaimant's counsel. On a close examination, however, it will not be found to assert so broad a doctrine. The case was of a rescue attempted by an enemy master, having on board a neutral cargo; and this rescue attempted, not of the *captured* but of the *capturing* ship. It was argued that this resistance of the master exposed the whole cargo entrusted to his management to confiscation. The Court held that no such penalty was incurred. That the resistance could only be the hostile act of a hostile person, *who was a prisoner of war*, and who, unless under parole, had a perfect right to emancipate himself by seizing his own vessel. That the case of a neutral master differed from that of an enemy master. No duty was violated by such an act on the part of the latter, *lupum auribus teneo*, and if he could withdraw himself he had a right to do so. And that a *material* fact in the case was, that the master did not attempt to withdraw his property, but to rescue *the ship of the captor* and not his own vessel. Such was the decision of the Court, upon which several observations arise. In the first place, the resistance was not made previous to the capture; and therefore whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment, otherwise it would be extra-judicial. In the next place, it would be impossible to conceive how the fact, as to what vessel was seized, could be *material*, if the argument of the present claimant be correct, for in all events the resistance as to the cargo would be without any legal effects. In the last

[1] 5 Rob., 232 (1804).
[2] The "Adonis," 5 Rob., 256.
[3] The "Elzebe," 5 Rob., 174; the "Catherina Elizabeth," *ibid.*, 232.

place, it is clear that the case is put by the Court upon the ground that the master at the time of the act had been dispossessed of his vessel by capture, and was a prisoner of war. He was therefore no longer acting as master of the ship, and had no further management of her. His rights and duties, as master, had entirely ceased by the capture, and there could be no pretence to affect the ship or cargo with his subsequent acts, any more than with the acts of any other stranger. The case would have been entirely different with a neutral master, *whose relation to his ship continues notwithstanding a capture* and carrying in for adjudication. The case, therefore, admits of sound distinctions from that at bar, and cannot be admitted to govern it.

"There is another text not cited in the argument which may be thought to favour the doctrine of the claimant's counsel. It is the only passage bearing on the subject in controversy which has fallen under my notice in any elementary work. Casaregis, in his 'Commercial Discourses,' has the following remarks: 'Verum tamen notandum est quod si navis inimica onerata mercibus mercatorum amicorum aggressa fuerit alteram inimicam et mercatores aut domini mercium operam ac industriam dedissent pro ea aggredienda tunc merces dominorum cadunt etiam sub praeda, si navis predicta onerata mercibus fuerit depraedata, etc. etc. Et regulariter bona eorum qui auxilium inimices nostris praestant vel confederati cum iis sunt, praedari possunt.' It is obvious that Casaregis is here considering the case of an attack of an enemy merchant ship laden with neutral cargo, upon the ship of its enemy, in which the former is unsuccessful and is captured. Under such circumstances he holds that if the neutral shippers, or the persons having the management of the cargo (domini mercium) have aided in the attack, the cargo is forfeited upon the ground that all who assist or confederate with an enemy are liable to be plundered by the law of war. He does not touch the case where an enemy merchant ship simply makes resistance in her own defence, or resists the right of search; nor how far the master of such ship is the dominus mercium, or can by his own acts bind the cargo. Much less has he discussed the question as to what acts amount to an incorporation into the objects and interests of the enemy so as to affix a hostile character. It does not seem to me that his text can be an authority beyond the terms in which it is expressed. It pronounces affirmatively that a co-operation in an attack will induce confiscation of the cargo (which cannot be doubted), but it does not pronounce negatively that the resistance of an enemy master will not draw after it the same penalty. And if it were otherwise, it would deserve consideration whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

"The argument, then, on the footing of authority fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle it seems quite as difficult to support it. I am unable to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. The injury to the belligerent is in both cases equally great, for it equally withdraws the neutral property from the right of search, unless acquired by superior force. And until it is established that an enemy protection legally suspends the right of search, it cannot be that resistance to such right should

not be equally penal in each party. I have therefore no difficulty in holding that the resistance of the ship is in all cases the resistance of the cargo, whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property on the issue of battle must stand or fall by the event of the contest. The law of neutrality is silent when arms are appealed to in order to decide rights; and the captor is entitled to the whole prize won by his gallantry and valour. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration that in the earliest rudiments of prize law in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search to all vessels, without any discrimination of the national character of the vessels or cargoes. The Black Book of the Admiralty expressly articulates that *any vessel* making resistance may be attacked and seized *as enemies*;[1] and this rule is enforced in the memorable instructions of Henry VIII.[2] The ordinance of France of 1584 is equally broad, and declares *all such vessels* good prize; and this has ever since remained a settled rule in the prize code of that nation.

"Valin informs us that it is also the rule of Spain, and that in France it is applied as well to *French vessels* and cargoes as to those of neutrals and allies.[3] There is not to be found in the maritime code of any nation, or in any commentary thereon, the least glimmering of authority that distinguishes, in cases of resistance, the fate of the cargo from that of the ship. If such a distinction could have been sustained, it is almost incredible that not a single ray of light should have beamed upon it during the long lapse of ages in which maritime warfare has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied than against the exception now contended for.

"But even if it were conceded that a neutral shipper in a *general* ship might be protected, the concession would not assist the present claimant. His interests were so completely mixed up and combined with the interests of the enemy—the master was so entirely his agent under the charter-party—that it was impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprise was radically tainted with a hostile leaven. In its very essence it was a fraud upon belligerent rights. If for a moment it could be admitted that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship and navigate her with a neutral crew, those admissions would fall far short of succouring the claimant. He must successfully contend for broader doctrines—for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual, and man her with an enemy crew (for though furnished directly by the owner, they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freight, commissions, and profits; that he

[1] Rolls Series, 55 A., Vol. I, 29–31.
[2] Clerk's "Praxis," 164; Rob., "Collect. Marit.," p. 10 and note, and p. 118.
[3] Rob., "Collect. Marit.," p. 118; Valin, "Traits des Prizes," chap. 5, sec. V, p. 80.

can stipulate expressly for the benefit and use of enemy convoy and navigate during the voyage under its guns and protection; that he can be the entire projector and conductor of the voyage and co-operate in all the plans of the owner to render resistance to search secure and effectual; and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation and claim the privileges of an inoffensive neutral. On the contrary, it seems to me that such conduct is utterly irreconcilable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and armour of an enemy become useless for defence. If it be, as it undoubtedly is, a violation of neutrality to engage in the transport service of the enemy or to carry his despatches even on a neutral voyage, how much more so must it be to enlist all our own interests in his service and hire his arms and crew in order to prevent the exercise of those rights which as neutrals we are bound to submit to? The doctrine is founded in most perfect justice, that those who adhere to an enemy connexion shall share the fate of the enemy.

"On the whole, in every view which I have been able to take of this subject, I am satisfied that the claim of Mr. Pinto must be rejected, and that his property is good prize to the captors. And in this opinion I am authorized to state that I have the concurrence of *one of my brethren.* It is a matter of regret that in this conclusion I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty not to surrender my own judgment because a great weight of opinion is against me—a weight which no one can feel more sensibly than myself. Had this been an ordinary case, I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights suspended on it are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident, indeed, as to its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles."

This point arose three years later, was again argued, and the same decision repeated in the case of the "Atalanta,"[1] and is considered by Chancellor Kent to be the settled municipal law of the United States.[2]

Upon this point Marshall C.J. contented himself with observing that the case did not essentially differ from that of the "Nereide," and considered it unnecessary to repeat the reasoning upon which the Court based its decision. We may remark here that the majority was only three to two.

"The principle," says Marshall C.J., "of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be, changed or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknowledged, this Court must reject constructions which render it totally inoperative."[3]

[1] 3 Wheaton, 409.
[2] "Commentaries," 12th ed., p. 131–2.
[3] 3 Wheat., 415.

In delivering his judgment, Mr. Justice Johnson pointed out that the cargo on the "Nereide," considered as Spanish property, was liable to capture by the "Carthaginian" and other privateers; whilst considered as the property of a revolted colony, it was liable to Spanish capture. In his opinion, therefore, the neutral shipper

"could not be charged with evading our belligerent rights or putting off his neutral character when placing himself under the protection of an armed belligerent; when sailing, as that shipper was, between Scylla and Charybdis, he might accept of the aid or protection of one belligerent without giving just cause of offence to another."

But the "Atalanta" was a vessel at peace with the whole world. It was a British armed vessel, non-commissioned, and not a cruiser.

Upon these facts Mr. Justice Johnson proceeds to controvert the views of Mr. Justice Story, expressed in the "Nereide." He considered all the evils alluded to as visionary.

"No nation can be powerful on the ocean that does not possess an extensive commerce; and if her armed ships are to be converted into carriers (almost, I would say, an absurd proposition), her own commerce would have the preference, so that the injury could never be of any real extent. But should it be otherwise, what state of things ought one belligerent more devoutly to desire than that the whole military marine of her enemy should be so employed and bound down to designated voyages, from which they were not at liberty to deviate? It would be curious to see a Government thus involving itself with merchant shippers in questions of affreightment, assurance, deviation, average, and so forth. The possibility may be imagined, but the reality will never exist."

To prove this exception to the general rule, it is, argues Mr. Justice Johnson, for the captor to prove that the acknowledged right of the neutral to employ a belligerent carrier does not include the right of employing an *armed* belligerent carrier. The silence of the world upon the point is really evidence of its small practical importance and of public opinion. And it is not true that it has altogether escaped the notice of jurists. Casaregis asserts:—

"That if a vessel laden with neutral merchandise attack another vessel and be captured, her cargo shall not be made prize unless the owner of the goods or his supercargo engage in the conflict."

Now if an actual attack shall not subject to forfeiture, much less shall arming for defence; and it is fairly inferable from this passage that the author had in his mind the case of an armed belligerent carrier or he would not have represented her as the attacking vessel.

The learned judge next compares the case with that of a vessel under neutral or hostile convoy. In the former the vessel puts off

her pacific character, and must be bound by the fate of the convoy. If the carrier is neutral, resistance either real or constructive is unlawful; but not so with the hostile carrier, which is entitled to resist, and in her case, therefore, no offence is committed so as to communicate a taint to her cargo.

"But it is contended that the right to use a hostile armed carrier is inconsistent with the belligerent's right of search or of capture or of adjudication; for on this point the argument is not very distinct, though I plainly perceive it must be the right of adjudication, if any, that is impaired. The right of capture applies only to enemy ships or goods; the right of search, to *enemy goods* on board a *neutral* carrier; and therefore it must be the right of adjudication that is supposed to be impaired, which applies to the case of goods found either on board a neutral or belligerent, and this mere *scintilla juris* is at last the real basis upon which the exception contended for must rest. But in what manner is this right of adjudication impaired? The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He has no right to capture it; and if it be *hostile* covered as *neutral*, the belligerent is only compelled to do that which he must do in all ordinary cases—subdue the ship before he gets the cargo. It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral. Nor is it at all certain that lading on board an enemy carrier is done at all times with an intent to avoid capture; it may be to solicit it; as in the case of the late war, when British goods, though neutral owned, could only be brought into our market through the medium of capture. There, instead of capture being a risk of the voyage, it was one of the chances of profit. And the hostile carrier may have been preferred to the neutral with the express view of increasing the chance of capture.

"The exception which exhausts the rule must be incorrect if the rule is correct, since it is in fact an adverse proposition.

"If it be unlawful to employ an armed belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred the difference is only in degree, and not in principle.

"Again, the proposition is that the neutral may employ a hostile carrier; but the indispensable attributes of a state of hostility are the right of armament, of defence, of attack, and of capture; if, then, you strip the belligerent of any one or more of these characteristics, the proposition is falsified, for he can no longer be called a hostile carrier; he assumes an amphibious, anomalous character, for which there is no epithet applicable unless it be that of semi-hostile. And what becomes of the interest of the neutral? It is mockery to hold out to him the right of employing a hostile carrier when you attach to the exercise of that right consequences which would make it absurd for a belligerent to enter into a charter-party with him. If resistance, arming, convoying, capturing, be the acknowledged attributes and characteristics of the belligerent, then deprive him of those attributes, and you reduce him to a state of neutrality—nay, worse than a state of neutrality, for he continues liable to all the danger incident to the

hostile character, without any of the rights which that character confers upon him. What belligerent could ever be induced to engage in the transportation of neutral goods if the consequences of such an undertaking be that he puts off his own character and assumes that of the neutral—relinquishes his right of arming or resisting without acquiring the immunities or protections of the neutral character? It is holding out but a shadow of a benefit to the neutral."

The argument that the neutral shipper is assisting in expediting a naval hostile equipment when he employs an armed belligerent carrier the learned judge dismisses as unfounded. On the contrary, he either embarrasses the belligerent in, or detaches him from, the operations of war.

"What violation," asks the learned judge, "of belligerent right or neutral obligation can result from the employment of a hostile carrier? If employed to break a blockade, carry goods that are contraband of war, or engage in other illicit trade, the goods are liable to condemnation on principles having no relation to this case. But if employed in lawful commerce, where is the injury done to the belligerent? There is no partiality exhibited on the part of the neutral, for the belligerents are necessarily excluded from each other's ports and cannot be employed except each in the commerce of his own country; and so far from violating any belligerent right, the neutral tempts the ship of the enemy from a place of safety to expose her to hostile capture, or detaches her from warlike operations and engages her in pursuits less detrimental to the interest of her enemy than cruising or fighting. To the neutral the right of employing a hostile carrier may be of vital importance. The port of the enemy may be his granary; he may have no ships of his own, no other carrier may be found there, no other permitted to be thus employed, or no other serve him as faithfully or on as good terms. So also with regard to the produce of his own industry, his only market may be in the market of one of the belligerents, and his only means of access to it through the use of the carriers of that port."

Upon the whole, the learned judge was

"fully satisfied that the decision in the case of the 'Nereide' was founded on the most correct principles, and recognized the rule that lading on board an armed belligerent is not *per se* a cause of forfeiture; as not only the most correct on principle, but the most liberal and honourable to the jurisprudence of his country."

2. Where it is obvious, or even where there is some evidence giving rise to a suspicion that the vessel is engaged in some illicit act, she is liable to capture, e.g. when—

(*a*) Acting as the enemy's transport or carrying the enemy's military or naval officers and crews.

(*b*) Carrying the enemy's despatches.

(*c*) Carrying contraband of war.

(*d*) Attempting to break a ***de facto*** blockade after official notification or with knowledge.

(*e*) Engaging in the enemy's colonial or coasting trade.

(*f*) Proceeding as a vessel equipped for war to a belligerent.

(*g*) Equipping, furnishing, fitting out, or arming vessels, or allowing the same to be so equipped, furnished, fitted out, or armed for the use of belligerents.

The effect of condemnation or of acquittal upon the vessel and the cargo in each case may also be considered.

(*a*) **Acting as enemy's transport or carrying the enemy's military or naval officers or crews.**—Acting in the transport service of a belligerent, whether voluntarily or under compulsion, subject the ship and any property on board to confiscation. The "Carolina," a Swedish vessel, had been used for the transport of French troops to Alexandria, and had been captured by the English on its return voyage. She was condemned by Sir William Scott.[1]

The "Friendship"[2] was the case of a small American vessel laden with fustic and some staves, which were frequently used as ballast but very seldom as principal cargo. She carried about eighty-four French military officers and mariners who were proved to be still on active service.

In declaring the ship to be a French transport, Sir William Scott said :—

"It would be a very different case if a vessel appeared to be carrying only a few individual ***invalided*** soldiers or discharged sailors, taken on board by chance and at their own charge. Looking at the description of the men on board, I am satisfied that they are still as effective members of the French marine as any can be. Shall it be said, then, that this is an innoxious trade, or that it is an innocent occupation of the vessel? What are arms and ammunition in comparison with men who may be going to be conveyed perhaps to renew their activity on our own shores? They are persons in a military capacity who could not have made their escape in a vessel of their own country. Can it be allowed that neutral vessels shall be at liberty to step in and make themselves a vehicle for the liberation of such persons whom the chance of war has made in some measure prisoners in a distant port of their own colonies in the West Indies? It is asked, will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from America to Europe? If he were going merely as an ordinary passenger, as other passengers do, and at his own expense, the question would present itself in a different form. Neither this Court nor any other British tribunal has ever laid down the principle to that extent. This is a case differently composed. It is a case of a vessel letting herself

[1] 4 Rob., 256 (1802). [2] 6 Rob., 420 (1807).

out in a distinct manner, under a contract with the enemy's Government, to convey a number of persons described as being in the service of the enemy, with their military character travelling with them, and to restore them to their own country in that character."

The ship and cargo were both condemned.

The case of the "Orozembo"[1] was similar, except as to the number of passengers and the absence of cargo. The vessel was found to have been chartered to take out three Dutch military officers of distinction to Batavia. In condemning the ship, Sir William Scott stated that the principle on which he determined the case was—

"That the carrying military persons to the colony of an enemy who are there to take on them the exercise of their military functions, will lead to condemnation, and that the Court is not to scan with minute arithmetic the number of persons that are so carried."

The learned judge had no hesitation in finding, either on principle or on the facts, that the "Orozembo" was liable to be considered as a transport let out in the service of the Government of Holland, and as such liable to condemnation.

In these three cases, said Mr. Justice Story, in the "Commercen"[2]—

"The fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile State, and assist in warding off the pressure of the war, or in favouring its offensive projects."

(*b*) **Carrying the enemy's despatches.**—The effect of the carriage of papers of a public nature was said by Sir William Scott to be governed by the attendant circumstances. In some cases the conveyance of despatches for the enemy affixed a hostile character to the ship. In others the conveyance was not of a criminal nature, and although the vessel was justly subject to the inconvenience of seizure and detention, it was not liable to confiscation.[3] In the former the criminal act involves the confiscation of the ship and of the cargo also, if it is the property of the owner of the ship.[4]

In the latter, in addition to the inconvenience of seizure and detention, the neutral carrier may have to pay the expenses of the captor.[5]

Where the circumstances involve a hostile character, the effect has already been considered.[6]

[1] 6 Rob., 430 (1807). [2] 1 Wheaton, 382.
[3] The "Madison," 1 Edw. Ad. Rep., 224 (1810).
[4] The "Atalanta," 6 Rob., 4.
[5] The "Madison," 1 Edw. Ad. Rep., 224.
[6] See pp. 304-7.

(*c*) **Carrying contraband of war. The ancient practice.**—Under the ancient practice, the carriage of contraband of war subjected the ship and all the rest of the cargo, however innocent, to confiscation.

This practice, in Sir William Scott's opinion, was entirely defensible on every principle of justice.

"If to supply the enemy with such articles," he declared, "is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions."[1]

The relaxation which has given rise to these exceptions has been directed in its practical application, as well as in its origin, only to such cases as afford a presumption that the owner of the ship is innocent or that the master is deceived. Where the owner is himself privy to the transaction, or where his agent interposes so actively in the fraud as to consent to give additional cover to it by sailing with false papers or under a false destination, or is guilty of concealment or other misconduct, all pretence of ignorance or innocence is precluded; and there seems to be no further ground consistent with equity and good sense in which the relaxation in favour of the ship can any longer be supposed to exist.

Bynkershoek and Heineccius both agree that on principle the penalty ought to attach to the ship as well as to the cargo. The former writes:—

"Publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent, et nisi pacta impediant omnino publicandæ sunt quia earum domini operantur rei illicitæ";[2]

whilst the latter maintains the same view in the following passage:—

"Quemadmodum ejusmodi pacta ad exceptionem pertinent; ita facile putet regulam istis non tolli adeoq. certi juris esse, ob merces illicitas naves etiam in commissum cadere."[3]

So, too, Boerius:—

"Quare omnia tam prohibita quam licita sive sunt deferentis sive non confiscantur, et etiam navis vel animal etiam, vel coffri sive bahuti, cum quibus res deferuntur et ita habetur in ord.

". . . Si res aut navis vel animal esset alterius ignorantis tunc non confiscatur."[4]

[1] The "Neutralitet," 3 Rob., 295 (1801).
[2] Q. J. P., lib. I, c. II.
[3] "De Nav. ob Vect. Merc. Vetit. Commiss.," c. 11, sec. 6.
[4] Boerius, "Decis. Burdegal.," 178 (1578).

Grotius does not deal specially with this point, but he says generally that the whole subject of contraband had been much agitated before his time:—

"De ea re acriter certatim scimus, cum alii belli rigorem, alii commerciorum libertatem defenderent."[1]

By the treaty between Great Britain and the United Provinces of 17 September, 1625, directed against Spain, ships carrying contraband were declared to be good prize;[2] and by the treaty between Great Britain and France of 3 November, 1653.[3]

In France, by the Ordinance of 1584, contraband goods were subject to pre-emption only;[4] but by the Ordinance of 1681 they were liable to confiscation. By the Regulations of 26 July, 1778, the penalty of confiscation was extended to the ship, if three-fourths of the cargo consisted of contraband.

The *Règlement* of 1778 is regarded by Hautefeuille merely as a municipal law, not binding on other nations unless they have concluded treaties embodying its terms. Ortolan, on the contrary, supposed it applicable to all those States with which France had not conventions excluding it.

In Holland the penalty of confiscation attached to the contraband goods only. Freight, however, was refused. The principle upon which these regulations were framed is vindicated by Bynkershoek in the following passage:—

"Idque longe verissimum est, nam mercedes non debentur, nisi itinere perfecto, et, ne perficeretur, hostis jure prohibuit. Deinde publicantur contrabanda velox delicto, et ita nihil commiserunt navarchi, quam ipsi mercium vetitarum domini, vel quod magis est, ex re, ex ipsa nimirum transvectione: quamvis enim amico nostro non possimus commercio interdicere cum hoste nostro possumus tamen prohibere, ne in bello illi prosit in necem nostram. Atque ita, quod publicatur, publicabitur citra ullum ullius hominis respectum et habebitur, ac si divina periisset, extincto sic jure pignoris."[5]

Shortly after the death of Grotius the relaxation began to be introduced into treaties. The first treaty in which an exception was allowed in favour of the ship was that between Spain and the United Provinces of 17 December, 1650,[6] in which the terms are general and admit of no particular observation. The second was the treaty between France and the Hanseatic Towns of 10 May, 1655,[7] in which the terms are more precise, and point distinctly to the principle on which the relaxation is founded. By Art. 11—

"S'il se trouvoit des dites contrebandes sur des vaisseaux des dits habitans, chargés à cueuillette en un ou plusieurs lieux, elles seront confisquées

[1] Lib. III., c. 1, sec. 5.
[2] Art. 20. Dumont, Vol. V, 267.
[3] Art. 15.
[4] Art. 69.
[5] Quaest. Jur. Pub., I, c. 10.
[6] Dumont, Vol. VI, part i, ccxxxv, 570.
[7] *Ibid.*, Vol. VI, part ii, xxx, 103.

purement et simplement, sans que les autres marchandises, ni le vaisseau le puissent être et celui qui les aura chargées sera tenu à tous les dépens, dommages et interests soufferts par raison de ce par les interessés aux vaisseaux."

This was evidently in its terms a relaxation for cases only in which the owner of the vessel might be supposed to be a stranger to the transaction.

In the latter part of the seventeenth century the stipulation in treaties became more general.

A book published in the year 1706, which, although not of direct legal authority, most probably contains a true account of the general practice at that period, contains the following passage:—

"If part of a cargo taken by a privateer be prohibited goods, and the other part not prohibited, but such as according to the necessity of the war shall be so deemed, that may draw on a consequential condemnation of the ship as well as the lading. If part of the lading is prohibited and the other part is merely for pleasure, the former only shall be adjudged prize, and the ship and the rest of the cargo be discharged; but if all the lading be contraband goods, both ship and goods may be made prize."[1]

By Art. VI of the treaty of commerce between the King of Denmark and Norway and the Republic of Genoa, concluded in 1756 and confirmed in 1789, it was mutually agreed that contraband goods should be confiscated, but that the ship and the rest of the cargo should be free.[2]

By the treaty of 30 September, 1800, between France and the United States—which was limited to eight years—in Art. XIII, confining contraband to articles connected with war, it was provided that—

"The vessel in which they are laden and the residue of the cargo shall be considered free and not in any manner infected by the prohibited goods, whether belonging to the same or different owners."[3]

Russia appears still to adhere to the old practice whereby both the ship and cargo are liable to confiscation. By her declaration of 19 April, 1854, which provided that enemy's property in neutral bottoms would be regarded as inviolable, and that neutral property on enemy's ships, except contraband of war, would also be free, it was declared that the neutral vessel carrying contraband of war should be good prize.[4]

Modern practice.—In the following cases the ship and cargo, whether contraband or innocent, are condemned:—

(1) Where the ship and cargo belong to the same person.

[1] "Sea Laws," 3rd ed., 472.
[2] De Martens, "Rec.," IV, 443.
[3] U.S. Statutes at Large, Vol. VIII, 184.
[4] "Annuaire des Deux Mondes," 1853-4, 928; Dana's "Wheaton," 534, note (1863).

In the "Staadt Embden"[1] Sir William Scott declared that by the law of nations—

"to escape from the contagion of contraband, the innocent articles must be the property of a different owner."

In the "Jonge Tobias,"[2] a Mr. Schraeder, part owner of the vessel, was also found to be the sole owner of the cargo.

In condemning the cargo as contraband, Sir William Scott also declared his share in the vessel to be confiscated :—

"Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation."

Upon the assumption that the other part owners of the vessel had no knowledge of the contraband nature of the cargo, as they were only part owners of the vessel, and not general partners of Mr. Schraeder, Sir William held that they were not to be necessarily affected by his criminal acts.

This principle is strongly maintained by Bynkershoek :—

"Sed omnino distinguendum putem an licitæ et illicitæ merces ad eundem dominum pertineant, an ad diverses, si ad eundem omnes recte publicabuntur, ob continentiam delicti."[3]

The case of the "Jonge Margaretha"[4] forms an exception to this rule. Here the ship and cargo of provisions, belonging to the same person, were captured on a voyage from Amsterdam to Brest, a hostile port. The provisions were found by Sir William Scott to be, under the circumstances of the case, contraband, and were condemned as such. But as the owner had acted without dissimulation, and might have been misled by an inattention to circumstances to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he had relied, Sir William contented himself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship, belonging to the same proprietor.

(2) Where the cargo is carried with a false destination, false papers, or other circumstances of fraud.

The "Franklin"[5] was a Prussian vessel with a cargo of hemp and iron from Lubeck, ostensibly to a neutral port, Lisbon, but really to a hostile port, Bilboa. If the destination was to a hostile port, part of the cargo would have been contraband. Upon the evidence, the vessel was found to be making for a hostile port

[1] 1 Rob., 26 (1798).
[2] *Ibid.*, 329 (1799).
[3] Quaest. Jur. Pub., I, c. 12.
[4] 1 Rob., 189 (1798).
[5] 3 Rob., 217 (1801).

under a false destination, and Sir William Scott, after taking time to consider his judgment, declared—

"that the carriage of contraband worked a condemnation of the ship as well as the cargo."

"When the destination is dissembled," said Sir William Scott in the "Edward,"[1] "confiscation is the clear and necessary consequence."

This was the case of a Prussian vessel and a cargo of wines, captured on a voyage from Bordeaux, ostensibly to Emden, but really Brest, a hostile port. Sir William therefore held that although wines were not generally contraband *per se*, yet in conjunction with all the circumstances of the voyage they were unquestionably to be considered as naval stores. It was a voyage to Brest, where there was notoriously a large armament lying very much in want of an article of this kind, an article of an indispensable nature.

In the "Richmond"[2] there was, in addition to a false destination, actual concealment of part of the cargo, pitch and tar, which, if going to a hostile port, was of a noxious character. The ship and cargo were condemned.

The "Ranger"[3] was an American ship with a cargo of biscuit and flour, put on board from the public stores at Bordeaux, on a voyage ostensibly to Ville Real, in Portugal, but really to Cadiz, a hostile port. Sir William Scott not only condemned the cargo as contraband and the vessel as employed in carrying sea stores to a place of naval equipment under false papers, but he also condemned the claimant in the expenses of the claim, stigmatizing the transaction as an act of ill faith.

(3) Where the owner of the ship is bound by the obligation of treaties between his own State and that of the captors to refrain from carrying contraband.

In the case of the "Ringende Jacob"[4] it was alleged that the vessel was carrying contraband, and that by virtue of an ancient treaty between Great Britain and Sweden which forbade the subjects of either Power "to sell or *lend* their ships for the use and advantage of the enemies of the other," and as this prohibition was connected in the same clause with the subject of contraband, the carriage of contraband was such a *lending* as came within the meaning of the treaty.

Sir William Scott refused to listen to this argument.

"To let a ship," he said, "on freight to go to the ports of the enemy cannot be termed lending but in a loose sense; I apprehend the true

[1] 4 Rob., 68.
[2] 5 Rob., 325 (1804).
[3] 6 Rob., 125 (1805).
[4] 1 Rob., 89 (1798).

meaning to have been that they should not give up the use and management of their ships directly to the enemy or put them under his absolute power and direction. It is besides observable that there is no penalty annexed to this prohibition. I cannot think that such a service as this will make the vessel subject to confiscation."

The "Neutralitet"[1] was a Danish ship taken with a cargo of tar on a voyage from Archangel to Dordrecht. She had been a Dutch vessel, and was asserted to have been purchased by Mr. Schultz, of Altona. She then went from Holland to Altona, and was from thence sent to Archangel to carry a cargo to Dordrecht, under a charter-party made by the asserted owner.

This, said Sir William Scott, was a case of singular misconduct on the part of the asserted shipowners. They were subjects of Denmark, and as such were under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of Great Britain.

"In this instance the ship was freighted at Altona to go to Archangel for the purpose of carrying a cargo of tar to Holland, which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port, even when it is the produce and manufacture of Denmark. This ship goes to a foreign port to effect that which she is prohibited from doing even for the produce of her own country: in this respect throwing off the character of a Danish ship by violating the treaties of her country; and all this is done with the full privity of the asserted owner, who is the person entering into the charter-party."

The ship was condemned.

By the treaty between Great Britain and Sweden of 25 July, 1803, "all manufactured articles immediately serving for the equipment of ships of war" were declared to be contraband. The "Charlotte"[2] was a Swedish vessel carrying a quantity of copper in sheets, of which one portion was said to be fit for sheathing of ships, another was doubtful, and the remainder not fit for that purpose. In condemning that part which was reported fit for sheathing, Sir William Scott said:—

"In ordinary cases, the rule is that one article of contraband quality will affect all parts of the cargo on board belonging to the same proprietor; but this is a new case, respecting the construction of a treaty, on which a difference of opinion may have been entertained. I shall therefore not apply the old rule to this case, but direct the undisputed articles to be restored. The other parcels of copper which are reputed to be of doubtful quality must be reserved for further consideration."

Both Ortolan and Hautefeuille are opposed to the penalty of confiscation for the carriage of contraband being extended to the

[1] 3 Rob., 295 (1801). [2] 5 Rob., 275 (1804).

ship or innocent cargo, although they differ as to the principle on which their opinions are based.

"We believe firmly," says the former, "that in no case should the ship which carries the contraband, nor the innocent merchandise be confiscated. We must not overlook the fact that the subjects of neutral States, strangers to the quarrels of belligerent Powers, preserve in principle the liberty of carrying on commerce with each of those Powers when in this commerce they carry to the one or the other, or both, articles of a nature directly and exclusively for war, the act is not that of enemies but of merchants; neither of the belligerents, then, is authorized to treat them, on that account, as enemies, and to declare, under that title, good prize the neutral ship and the innocent portions of the cargo. However, it is true that in extending their commerce to such objects they injure the interests of one or the other of the Powers at war, and expose themselves to the exercise of the acknowledged right of those Powers to interpose obstacles to the transportation of such articles. The consequence is, that their merchandise may be stopped on its way, and the international reason adds, in order to give more efficiency to the prohibition, it shall be subject to confiscation. This confiscation is a logical punishment which flows from the very nature of things, and is proportioned to the gravity of the infraction, since it reaches all the prohibited objects whether the quantity is small or great. To go further and confiscate the neutral vessel and the merchandise not prohibited would be to apply a punishment variable and arbitrary in its extent, falling often on the innocent, and unjustifiable even in the particular cases mentioned."[1]

Hautefeuille, on the other hand, considered that the prohibition of a trade in contraband arose not from right of the belligerent, but from a duty imposed by the primitive law upon neutrals.

"The primitive law," he writes, "makes it a duty for neutrals not to connect themselves with the hostilities; and consequently not to furnish to the belligerents the direct means of fighting; but this duty stops there. At the side of this duty exists a right likewise altogether sacred and absolute, that of preserving the freedom of trading in all innocent objects with all peoples, even with the belligerents. The seizing and taking of contraband articles are in reality only the means of execution for a right; they never can be considered as a punishment applied to a guilty party. If they had that character, it would be necessary to interdict them to a belligerent, because he has no quality to pronounce a punishment against a neutral, against the subject of a foreign sovereign. This right only belongs to him who possesses the jurisdiction. As to a punishment, if one is to be applied, the chief of the injured nation should address himself to the neutral sovereign and ask that the guilty parties should be tried in their own country and according to its laws. The power of the belligerent is not to punish the author of the act which injures him, but to prevent this act from being consummated, that the contraband should not be carried into the country of his enemy; to seize those articles when they are destined to the ports of his adversary. The secondary law going further than the primitive law, has authorized him to confiscate the contraband, which he should only have detained. But the innocent articles,

[1] "Dipl. de la Mer," tom. II, liv. III. c. 6, 187, 2nd. ed.

whether in greater or less quantity, of greater or less value, the ship itself, are not dangerous for the belligerent: he has not the right of taking possession of them to prevent their going to the place of their destination. He could only do that in order to punish the act of contraband, and not to prevent it; but his power does not extend so far, it is restricted as I have just stated."[1]

Freight and expenses.—By the modern practice the mere carriage of contraband does not *per se* entail confiscation of the ship, but only subjects the neutral owner to loss of freight and expenses. But this is a relaxation of the ancient practice, whereby the carriage of contraband usually affected the ship in any event. The relaxation, however, was a relaxation, the benefit of which could only be claimed by those who had acted in good faith.[2] This alteration in the ancient practice of allowing a ship to go free, subject to forfeiture of freight, only applies to those cases where the owners of the ship and cargo are different persons.[3]

Freight and expenses are almost always refused by British prize courts to carriers of contraband.

The "Sarah Christina"[4] was a Swedish vessel laden with tar, pitch, iron hoops and bars, bound ostensibly for a neutral port, but really for a hostile French port.

In refusing freight and expenses, Sir William Scott said:—

"I am of opinion, then, that this cargo, consisting of some articles contraband in their own nature and going to the enemy's port, under a total absence of that fair conduct which ought to have been maintained in order to entitle it to the benefit of the more favourable rule, is subject to condemnation. With respect to the ship: if I was satisfied that the ship and cargo belonged to the same person, I must condemn that also, upon the ordinary rule, which extends the penalty of contraband to all the property of the same owner involved in the same unlawful transaction. But I shall restore it under the strong doubt which I entertain whether the cargo is not in fact the property of other persons—I mean of French agents. . . . In giving the owner of the ship any benefit from these doubts, I am practising a lenity which would require more apology than, on strict principle, I might find easy to furnish; but I shall content myself with the restitution of the ship, withholding, as usual in the carriage of contraband, the allowance of freight and expenses."

The "Mercurius"[5] was a vessel belonging to some merchants of Hamburg, captured on 13 November, 1796, on a voyage from Archangel to Rotterdam with a cargo of tar, of which 200 barrels remained unclaimed. An application for an allowance of

[1] "Droits des Nat. Neut.," tom. III, tit. XIII. c. I. 224–34.
[2] The "Franklin," 3 Rob., 217 (1801).
[3] The "Jonge Tobias," 1 Rob., 329 (1799).
[4] 1 Rob., 237 (1799). [5] *Ibid.*, 288.

freight was refused on the ground that the cargo contained articles of contraband.

To this practice, however, there appears to be an exception in those cases where the contraband is of a negligible amount. In the case of the "Neptunus"[1] it was said that the utmost rigour of the rule would not be applied where the contraband articles were, amongst a variety of other articles, small in quantity. Freight and expenses were allowed.

Ignorance no excuse.—Where the master professed to be ignorant of the true nature of part of his cargo, which was described as linen, but was really sailcloth, and which was condemned as contraband, it was held that he could not be permitted to aver his ignorance. He was bound in time of war to know the contents of his cargo. Freight for the goods condemned was accordingly refused, whilst freight for the innocent goods restored was allowed. If a different rule could be sustained, it might be applied to excuse the carrying of all contraband.[2]

In the "Richmond,"[3] the master alleged that he had been deceived by the mate as to the quantity of tar on board.

"Here," said Sir William Scott, "is a noxious article on board, and it is impossible that the master should not have known how much he had on board when he left America. He was, indeed, bound to know it, and cannot be heard to aver an ignorance of that fact; since there would be an end of the treaty if a master could be allowed to say, 'I am going to a belligerent port, but I do not know what I carry,' and by that ignorance could be admitted to justify the carrying of contraband."

The United States.—The American prize courts have similarly held that freight is never due to the neutral carrier of contraband. The "Commercen,"[4] a Swedish vessel, laden with a cargo of barley and oats, the property of British subjects, was on a voyage from Limerick to Bilbao, the cargo being intended for the use of the British forces in Spain. She was captured on 16 April, 1814, by an American privateer.

"The general rule," said Mr. Justice Story, in delivering the opinion of the Court, "that the neutral carrier of enemy's property is entitled to freight is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight; and in cases of a more flagrant

[1] 3 Rob., 108 (1800).
[2] "Oster Risoer," 4 Rob., 129 (1802).
[3] 5 Rob., 333 (1804).
[4] The "Commercen," 1 Wheat., 387.

character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted."

The cargo, as the property of the enemy, was liable in any event to condemnation. "But was the voyage lawful," asked Mr. Justice Story, "and such as a neutral could with good faith and without a forfeiture engage in?"

Here was a cargo of provisions exported from the enemy's country with the avowed intention of supplying the army of the enemy. Freight was therefore denied.

"Can," asked the learned judge, "a more important or essential service be performed in favour of the enemy? In what does it differ from the case of a transport in his service? . . . Nor do we perceive how the destination to a neutral port can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses."

"The fact that the destination was to a neutral port formed no ground for exemption from the general rule," declared Chief Justice Marshall, "that a neutral carrying supplies to the army of the enemy does, under the mildest interpretations of international law, expose himself to the loss of freight, is a proposition too well settled to be controverted."

Penalty of confiscation attaches from the commencement of the illicit voyage.—The offence of carrying contraband goods becomes complete, and the penalty of confiscation consequently attaches from the moment the vessel leaves the port on a hostile destination.

"From the moment of quitting port," said Sir William Scott, in the "Imina,"[1] "the offence is complete; and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto* and in the actual prosecution of such a voyage, the penalty is not now generally held to attach."

In this case the original hostile destination had been altered by the master, and the vessel was making for a neutral port at the time of her capture. There was in consequence no *corpus delicti* existing at the time of the capture. Here the cargo was taken on a voyage to a neutral port.

"To say," said Sir William, "that it is nevertheless exposed to condemnation on account of the original destination as it stood in the minds of the owners, would be carrying the penalty of contraband further than it has ever been carried by this or the Superior Court. If the capture had been made a day before, that is—before the alteration of the course—it might have been different."

Restitution was ordered, and as it was incumbent on the captors to bring the cause to adjudication in consequence of the apparent original destination, they were allowed their expenses.

[1] 3 Rob., 167 (1800).

The same view was maintained in the case of the "Trende Sostre,"[1] a Danish vessel captured on 14 May, 1806, at the Cape of Good Hope, where she had touched, on an ulterior destination to Tranquebar with a cargo of cordage, tar, iron, gin, and wine, and with despatches from Holland to the Dutch Governor at the Cape. Before the arrival of the vessel the Cape Colony had surrendered to the British.

"If," observed the Court, "the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole guilt. Because, from the moment when the Cape became a British possession the goods lost their nature of contraband. They were going into the possession of a British settlement, and the consequence of any pre-emption that could be put upon them would be British pre-emption. It has been said that this is a principle which the Court has not applied to cases of contraband, and that the Court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction, because the principle on which the Court proceeded was, that there must be a *delictum* existing at the moment of the seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made whilst the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer going to the port of an enemy, it is not enough to say that they were going on *an illegal intention*. There may be the *mens rea* not accompanied by the act of going to an enemy's port. I am of opinion, therefore, that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade. I am not aware of any cases in which the penalty of contraband has been inflicted on goods *not in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the return voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in fact, though not in intent. I am of opinion that it is a discharge and a complete acquittal, that long before the time of the seizure those goods had lost their noxious character of going as contraband to an enemy's port."

Right to continue voyage upon surrender of contraband goods.—It has been assumed by some writers that a neutral vessel is entitled to purchase her freedom and continue

[1] 6 Rob., 390, note (1807).

her voyage upon the surrender of whatever contraband goods may be on board, provided they are not greater in bulk than the captor is able to receive.

It may be at once stated that no such right is known to International Law, and, indeed, could not exist upon any known principle of law. Moreover, any such right is negatived by the numerous treaties which establish this practice between the respective parties. Where the alleged contraband is the property of the owner of the ship, a voluntary surrender on his part would not affect the rights of others, and if such surrender were accepted by the captor, no further difficulty would arise. But this is a long way from establishing any right to proceed as against the captor. Moreover, where the ship and cargo are the property of several owners, the neutral carrier, as Dana observes, could not prevent the owner of the alleged contraband from claiming his property in Court. The captor, therefore, for his own protection, is bound to take the cargo into port and to submit it to adjudication. In addition, there would be the impossibility, as a rule, of detaching from the ship's papers the necessary documentary evidence and the difficulty of procuring the oral evidence on oath at sea in the manner required by law. In the face of these difficulties, he is inclined to think that even treaties can only apply to cases in which "there is a capacity in the neutral vessel to insure the captor against a claim to the goods."[1]

In the *Projet de Règlement International des Prises Maritimes* adopted by the Congress of International Law at Turin in 1882 and reaffirmed by the Congress at Heidelberg in 1887, it is provided by Sec. 33 that—

"Le navire arrêté pour cause de contrebande de guerre peut continuer sa route, si sa cargaison ne se compose pas exclusivement, ou en majeure partie, de contrebande de guerre, et que le patron soit prêt à livre celle-ci, au navire du belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du commandant du croisseur."[2]

The first conventional application of this practice appeared in the treaty of commerce between Russia and Denmark of 8 October, 1782.[3] This was quickly succeeded by similar provisions contained in the following treaties, viz., Sweden and the United States in 1783,[4] Austria and Russia in 1785,[5] England and France in 1786,[6] France and Russia in 1787,[7] Russia and the Two Sicilies in 1787,[8] Russia and Portugal in 1787,[9] United States and

[1] Dana's "Wheaton," note, No. 230.
[2] "Ann. de l'Inst.," 1882–3, 218; *ib.* 1888, 225.
[3] De Marten's "Rec.," III, 476, Art. xx.
[4] *Ibid.*, 571, Art. xiii.
[5] *Ibid.*, IV, 78, Art. xv.
[6] *Ibid.*, 172, Art. xxviii.
[7] *Ibid.*, 212, Art. xxxiii.
[8] *Ibid.*, 238, Art. xxii..
[9] *Ibid.*, 329, Art. xxvii.

France in 1800,[1] Russia and Sweden in 1801,[2] United States and Central America in 1825,[3] whereby it is enacted that "no vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of the said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they cannot be received on board the capturing ship without great inconvenience"; United States and Brazil in 1828,[4] United States and Mexico in 1831,[5] United States and Venezuela in 1836,[6] United States and Peru in 1836,[7] United States and Ecuador in 1839,[8] France and Ecuador in 1843,[9] France and Guatemala in 1848,[10] United States and New Grenada in 1848,[11] United States and San Salvador in 1850,[12] the Argentine Republic and Peru in 1874.[13]

(*d*) Attempting to break a *de facto* blockade after official notification or with knowledge.

(1) *Effect on the ship.*

The penalty for breach of blockade after notification or with knowledge is the condemnation of the vessel. Under the old law the penalty was much more severe. Not only were the ship and cargo confiscated, but the officers and crew were also imprisoned or subjected to some other personal punishment.[14]

"The Court has frequently decided," declared Sir William Scott in the "Neptunus,"[15] "that neutral vessels breaking a blockade are liable to confiscation . . . and that a blockade is broken as much *by coming out* as by going in."

In the case of the "Frederick Molke"[16] the real destination was to Havre. When off the latter port, the master was warned by an English frigate not to go into Havre, as there were two or three ships which would stop him, but he slipped in at night and delivered his cargo. During the continuance of the blockade the master came out with a fresh cargo and was captured.

Sir William Scott refused to admit that there was any analogy between the return voyage of a blockade runner and that of a carrier of contraband, to whom the penalty does not attach after she has discharged her illicit cargo.

[1] De Marten's "Rec.," VII, 491, Art. xvii.
[2] *Ibid.*, 332, Art. xvi.
[3] Nouv. "Rec.," VI, 834, Art. xviii.
[4] *Ibid.*, IX, 61, Art. xviii.
[5] *Ibid.*, X, 339, Art. xx.
[6] *Ibid.*, XIII, 558, Art. xix.
[7] *Ibid.*, XV, 119, Art. xv.
[8] Nouv. "Rec. Gen.," IV, 315, Art. xix.
[9] *Ibid.*, V, 410, Art. xviii.
[10] *Ibid.*, XII, 11, Art. xviii.
[11] *Ibid.*, XIII, 653.
[12] *Ibid.*, XV, 74, Art. xix.
[13] *Ibid.*, 2nd ser., XII, 448, Art. xxiii.
[14] Bynkershoek, "Quaest., J.P.," I, XI.
[15] 1 Rob., 170 (1799).
[16] *Ibid.*, 86 (1798).

"There is," he declared, "this essential difference, that in contraband the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship. For what is the object of blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place. I must therefore consider the act of egress to be as culpable as the act of ingress, and the vessel on her return still liable to forfeiture and confiscation. There may be cases of innocent egress, where vessels have gone in before blockade, and under such circumstances it could not be maintained that they might not be at liberty to retire. But even then a question might arise if it were attempted to carry out a cargo, for that would, as I have before stated, contravene one of the chief purposes of blockade."

In the case of *Tottie* v. *Heathcote*,[1] it was found by the Judicial Committee of the Privy Council that the "Johanna Maria," having entered the unblockaded port of Riga and discharged her cargo, had taken on board a fresh cargo with a full knowledge of the existence of the blockade at the time of loading, and in the expectation, as it was said, that the worst that could happen would be that she would be sent back by the blockading ships to unload her cargo.

As there was clear proof of a *de facto* blockade, with a full knowledge of it by the master, and nothing which could mislead him as to its extent or effect, the ship was condemned, but without costs of the appeal on account of some laxity in the blockade.

But when a ship has entered a blockaded port before the blockade, and her cargo was taken on board before notice of the blockade, she is entitled to bring it out.[2]

The law and practice in Holland is similar. Bynkershoek, commenting on the orders of the States General, 26 June, 1630, says:—

"Scilicet commercii intercludendi ergo ordines generales portus Flandriae navibus bellicis obsederant, adeoque omnes quorumcunque naves eo destinatas, in deque exeuntes publicabant; quem admodum ex ratione, et gentium usu, urbibus obsessis nihil quicquam licet advehere vel ex his evehere."[3]

The only exception to the rule that a blockade is broken by egress as well as ingress is, says Sir William Scott in the "Neptunus"[4]—

"that of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade."

[1] 10 Moore, P.C.C., 70 (1855).
[2] *Cremidi* v. *Powell*, 11 Moore, P.C.C., at p. 116 (1857).
[3] "Quest. J. P.," I, c. IV.
[4] 1 Rob., 171 (1799).

Moreover, in conformity with the rule laid down, the offence of breach of blockade attaches to the vessel until the end of the voyage.

In the case of the "Welvart,"[1] Sir William Scott held that if a ship which has broken a blockade is taken on any part of that voyage, she is taken *in delicto*, and is subject to confiscation; and in the case of the "Juffrow Maria Schroeder"[2] the learned judge held that—

'Where a ship has contracted the guilt by sailing with an intention of entering a blockaded port or by sailing out, the offence is not purged away till the end of the voyage."

By the municipal law of France, however, liability to confiscation is limited to those cases only in which the vessel is captured in the act of attempting a breach of blockade.

The liability to the penalty for breach of blockade ceases from the moment the blockade is raised.—Whatever the intention of the parties may have been, if the state of affairs existing at the time of capture have so changed as not to support the *corpus delicti*, the penalty does not attach.

In the "Lisette"[3] the master had taken on board, out of lighters, cargo which he knew had come from Hamburg in breach of the blockade of that port, and was under an engagement to carry it on to the ultimate port of illegal destination. The blockade had been notified to be withdrawn on 25 September, 1806, and the "Lisette" was captured on the 26th.

'It is said," declared Sir William Scott, "that the offence was consummated by the act of sailing; so it is in a certain sense. But the ship was not taken *in delicto* . . . it is true, as has been observed, that the offence incurred by a breach of blockade generally remains during the voyage. But that must be understood as subject to the condition that the blockade itself continues. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The delictum may have been completed at one period, but it is by subsequent events entirely done away."

(2) *Effect on the cargo.*

If the ship and cargo are the property of the same owner the penalty of confiscation attaches to both.[4] But if they are the property of different owners, the infliction of the penalty depends upon the attendant circumstances.

"The general but not the universal rule," said Dr. Lushington

[1] 2 Rob., 128 (1799).
[2] 3 Rob., 147 (1800).
[3] 6 Rob., 387 (1807).
[4] The "Frederick Molke," 1 Rob., 86 (1798).

in *Baltazzi* v. *Ryder*,[1] "is that when the ship is condemned for breach of blockade the cargo must follow the same fate.

For instance, a vessel coming out of a blockaded port with a cargo is *prima facie* liable to seizure, "and to obtain release," said Sir William Scott, "the claimant will be required to give a very satisfactory proof of the innocency of his intention."[2] Here the cargo had been put on board after the commencement of the blockade, and egress was made during its continuance, facts which must have been within the knowledge of the shipper.

Where it is proved that there was a competent authority to impose a blockade, that it was in fact imposed, and that it was maintained in such a manner as to lay upon the parties affected an obligation to attend to it, then, said Sir William Scott in the "Rolla,"[3] if a ship comes out with a cargo taken on board subsequently to the blockade, the *onus probandi* is thrown on the party to prove that though the blockade might exist, there were circumstances that would operate to release the vessel and exempt her from the penalty of the law.

But where orders had been given for the goods prior to the existence of a blockade, and it appeared that there was not time for countermanding the shipment, the owner of the cargo is not held responsible for the act of the shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal. So also where there was no knowledge of the blockade until the ship had sailed, and the master, after receiving information, obstinately persisted in going on to the port of his original destination.

In both these cases there cannot be any imposition or fraud, since the facts speak for themselves, and the Court has only to look at the dates to satisfy itself of the innocence of the owner of the cargo.[4]

And so, too, if the master deviates from the original destination without the knowledge or consent of the owner of the cargo, in order to enter a blockaded port, the owner will not be punished.

"To maintain that the conduct of the ship will affect the cargo," said Sir William Scott in the "Mercurius,"[5] "it will be necessary either to prove that the owners were or might have been cognisant of the blockade before they sent their cargoes, or to show that the act of the master personally binds them. In America there could not have been any knowledge of the blockade; the cargo is innocent in its nature and sets out innocently. The master certainly is the agent of the owner of the vessel, and can

[1] 12 Moore, P.C.C., 173 (1858).
[2] 1 Rob., 88.
[3] 6 Rob., 364 (1807).
[4] The "Exchange," 1 Edw., 43.
[5] 1 Rob., 84 (1798).

bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them.

"It is argued," added the learned judge, "that to exempt the cargo will open the door to fraud, if neutrals are allowed to trade to blockaded ports with impunity, by throwing the blame upon the carrier master. But if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation, and it would, at the same time, be sufficient to cause the master to be considered in the character of agent as well for the cargo as for the ship.

"When a cargo is of a contraband nature, it will perhaps justify greater severity; but in cases of contraband it is held that innocent parts of the cargo belonging to other owners shall not be infected. This is, I think, a parallel case. There is misconduct on the part of the owner of the vessel, but none in the owner of the cargo."

The cargo was restored, because, as the learned judge observed, the shippers at the time of the shipment could not have known of the blockade.

Deviation into a blockaded port will be presumed to be in the service of the cargo.—In the case of the "Alexander,"[1] the vessel was on an ostensible voyage to Altona, and was captured when entering Havre during the blockade, under the pretence of being in want of provisions.

The ship was condemned for fraudulently attempting to enter a blockaded port. In coming to this decision the inference in all cases, said Sir William Scott, is—

"that a ship going into a blockaded port is going with an intention of disposing of the cargo."

In condemning the cargo, Sir William added:—

"It would be impossible to maintain a blockade in cases of this nature, which is directed more against the cargo than against ships, if the Court did not draw the inference that a ship going in fraudulently is going in the service of the cargo, with the knowledge and by the direction of the owner. If any inconvenience arises to the claimants of the cargo, from this necessary conclusion, the owners of the vessel or the master are the persons to whom they must look for indemnification."

In the case of the "Adonis"[2] the vessel had been warned that Havre was blockaded, but in spite of this warning, although her ostensible destination was Nantes, she persisted in her course to Havre under the excuse of the master that "he wanted to be better acquainted with the French coast."

The ship having been condemned, it was contended that the condemnation of the ship did not inure to the condemnation of the cargo.

"This is a case," said Sir William Scott, "in which I have taken some short time to deliberate, being unwilling to press with any degree of un-

[1] 4 Rob., 93 (1801). [2] 5 Rob., 256 (1804).

necessary severity the effect of presumption against this class of cases, more especially because it is one in which the principle of law, though unquestionably built upon the just rights of war, must be allowed to operate with some hardship upon neutral commerce; and because it is a class of cases on which the Court has little authority to resort to, but has to collect the law of nations from such sources as reason, supported in some slight degree by the practice of nations, may appear to point out. In the present case, it is now to be assumed that the ship was taken in a course to Havre. I collect that from the strange and incredible account of the master, which I have already said in my opinion cannot be true. It is to be inferred also, I think, that the master was induced to make this deviation from some sinister intention; and I may be warranted to presume that all this would not have been resorted to but in the service of the cargo."

It will be observed here that the learned judge piles up presumption upon presumption, and says that these are presumptions which must necessarily arise and by which he must be governed.

"It has happened," he goes on, "in other blockade cases, that excuses have been set up from want of water and provisions or from other occasions; but when the Court pronounces these excuses to be not real, a presumption necessarily arises that it was for the delivery of the cargo that such a fraud had been attempted, since there is scarcely any other adequate motive which can be supposed to induce a master to hazard the interests of his vessel. There is a presumption also," he continues, "in such cases, that this is done with the knowledge and at the instigation of the owner of the cargo; because although it is not an impossible thing that masters may be guilty of barratry, it is not a natural conduct, nor what is gratuitously to be supposed. These are, I think, just inferences, and the only question can be as to the effect of the presumption arising from them whether it shall exclude all contrary averment or whether it shall operate only as matter of evidence, in concurrence with other proof, as to the guilt of intention. It must undoubtedly bind the owner; but the question is, whether it shall do so *presumptively* or *conclusively;* and whether the party shall be let in to prove a contrary intention. I am of opinion he cannot. I will not say that the fact may not exist, that a master should commit barratry in a case of this kind, but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence and equally impossible on the other side to detect it. For what would be the ordinary test? Letters sent to correspondents elsewhere and insurances—measures wholly in the power of the parties and capable of being made, at their pleasure, a complete recipe for a safe traffic with a blockaded place. When this consequence is duly weighed on one side and when it is considered on the other, what few inducements a master can have to go to any other port than that at which his charter-party binds him to deliver his cargo, and particularly to a blockaded port, it appears to me that less injustice will be done by adopting this rule than by permitting the freighter to distinguish by external and collateral evidence the destination of his cargo from that of the master.

"It has been argued that the master is not the representative of the owner of the cargo. Certainly he is not, to that extent, and in the same direct manner in which he is held to be the representative of the owner of the ship. . . . Here the blockade was perfectly well known to all parties at the time of the shipment, and therefore the question is raised whether the owner was not consentient at first, and whether the conduct of the master is not demonstrative evidence that he was so. In my opinion, the effect of all just presumption is against him, since there could scarcely be any inducement to lead the master to commit such a fraud, contrary to the instructions and intention of the owner of the cargo. Considering the infinite danger of admitting the shippers to distinguish their purpose from that of the master, I feel myself obliged to hold that it is sufficiently proved that the ship was going to a blockaded port and with the knowledge of the proprietor; and that the cargo is legally involved in the same penalty as the ship."

"If it was once admitted," said Sir William Scott in the case of the "Exchange,"[1] "that a ship may enter an interdicted port to supply herself with water or on any other pretence, a door would be open to all sorts of frauds without the possibility of preventing them."

In the case of the "James Cook,"[2] the vessel with an ostensible destination to Tonningen was captured at the entrance of the Texel.

"The situation of the vessel," said Sir William Scott, "will justify the legal conclusion that the master intended going into that port for the purpose of disposing of his cargo, and throws the onus upon him of exonerating himself by just and satisfactory explanations."

Upon the evidence, the learned judge found that it was the master's intention to go into that port.

"With respect to the cargo," he said, "I do not see how it is to be exempted from the fate of the ship; the master, who is also the owner of the ship, can hardly be supposed to have risked his vessel without the privity of the owner of the cargo, and in its service; but the fact is not very material, as the owners of cargoes must at all events answer to the country imposing the blockade for the acts of the persons employed by them, whereas in this case the blockade is known at the port of shipment; otherwise, by sacrificing the ship, there would be a ready escape for the cargo for the benefit of which the fraud was intended."

But supposing there was a *bona fide* change of intention on the part of the master, how far would it exonerate the ship and cargo?

"It is proper," answered the learned judge, "that there should be a *locus penitentiæ*, and if the case had been brought up to this, that the intention of going to a Dutch port had been abandoned, and that the ship had been captured while proceeding to some open port, the claimants would have had the benefit of that fact. But what is the case here? The ship is captured in a place where the fact is conclusive against her, for it

[1] 1 Edw., 39 (1808). [2] *Ibid.*, 261 (1810).

has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry. *That* in itself is a consummation of the offence, and amounts to an actual breach of the blockade. . . . The master had already broken the blockade; he had come up to the ground which it was improper for him to tread, and finding the impossibility of going in he turned away. Is that a *locus penitentiæ?* The matter was closed upon him; he had committed the offence as much as in him lay, and having been defeated in his purpose by a mere impossibility of effecting it, he cannot be heard to aver an innocence of intention."

The ship and cargo were condemned. But with whatever intention to break blockade the vessel may have sailed, yet if before capture the blockade has been raised, the offence ceases *ipso facto* in spite of the conflicting rule that the offence is committed at the moment of sailing with a criminal intention. In the "Conferenzrath"[1] Sir William Scott said:—

"With respect to the intention of the parties, it does appear from the charter-party that there was a design to violate the blockade; but though there may have been the *mens rea*, the parties have had the benefit of extrinsic circumstances turning out in their favour. The blockade was raised before the vessel sailed, so that there is not the *corpus delicti* existing that would be necessary also to draw upon them the penalties of the law."

In *Baltazzi* v. *Ryder*[2] the "Panaghia Rhomba" was captured when making for Odessa, a blockaded port, under the excuse of preserving the ship and cargo and the lives of those on board. After granting further proof as to this to both parties (which the learned judge did as a great concession, only justified by reason of the latitude extended to Oriental merchants), Dr. Lushington condemned the ship and cargo. The question for the Court then to determine is, he said—

"whether the excuse set up by the claimants for entering a blockaded port is proved by clear and decisive evidence. The *onus probandi* is upon the claimants, and they are bound to make out the affirmative to the satisfaction of the Court; for if there be any principle more important or more firmly established than another, it is that the presumption is against a vessel captured in entering a blockaded port, and that an imperative and overruling necessity for so doing must be established.

"The question is not what was the opinion of the master as to there being a necessity for going into a blockaded port, nor whether his conduct was *bona fide* or not; it is impossible for the Court to try a question of that description; the Court cannot try motives and convictions depending on the peculiar character and temperament of the master. The true and only question for consideration is, whether the necessity is proved by the evidence to have existed; and the necessity being proved,

[1] 6 Rob., 362.
[2] 12 Moore, P.C.C., 168 (1858).

it excuses an attempt to enter a blockaded port; the apprehension of necessity not proved works no such effect." Does the conduct of the ship, asked the learned judge, affect the cargo? "The general but not the universal rule is," he answered, "that when the ship is condemned for breach of blockade the cargo must follow the same fate."

After having examined the judgments of Sir William Scott in the "Mercurius," the "Alexander," the "Adonis," and the "James Cook," Dr. Lushington continued:—

"I can say with truth that I have exercised all my ingenuity to avoid, if possible, applying the principles laid down in the cases I have cited to that now under consideration, and I have done so because, looking at the whole case, I have no reason to believe that the claimants of the cargo had any intention of breaking the blockade. It is my duty, however, to declare that according to past decisions that consideration is not open to me, that I am forbidden to make an exception which, if once admitted, would in all cases of blockade call on the Court to consider the guilt or innocence of the owners of the cargo, a proposition which Lord Stowell declared to be fraught with danger; indeed, I believe it to be utterly impossible to enforce the belligerent rights of this country except upon general principles, and that all attempts to go upon purely equitable principles, particular decisions and particular cases, without regard to the great principles, can only have the effect of destroying the right and rendering it no longer worth the exertion which Great Britain used in times past for the purpose of protecting it."

Upon appeal by the owner of the cargo from this decision, a considered judgment of the Judicial Committee of the Privy Council affirmed the judgment of Dr. Lushington upon every point. The question raised was whether it was competent to the claimants of the cargo to protect their property from condemnation by showing their innocence in the transaction; or whether, under the circumstances of the case, the owners of the cargo were concluded by the illegal act of the master, *though it may have been done without their privity and even contrary to their wishes.*

Their lordships stated that if the law was to be collected from the decision in the "Mercurius" they would have had great difficulty in assenting to Dr. Lushington's judgment, but they considered that the subsequent cases appeared to have carried the rule there laid down much further, and to have established—

"That when the blockade was known or might have been known to the owners of the cargo at the time when the shipment was made, and they might therefore by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship.

"The propriety, or rather the necessity, of acting upon these rules is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master it would be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if in reality the penalty was incurred without any privity on their part."

Effect of a contingent destination.—When a vessel sails conditionally for a blockaded port upon the supposition that before her arrival the blockade may have been raised, and if not, then for a free port, the ship and cargo will not be condemned.

In the case of the "Shepherdess,"[1] an American ship and cargo, captured in the act of breaking the blockade of Havre, Sir William Scott, referring to American merchants, said:—

"At the same time, looking to the great distance at which they are placed, and being unwilling to press with any degree of hardship on the fair convenience of commerce, the Court has held, even when the blockade of a port in Europe has been notified in America, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition that before the arrival of the vessel a relaxation might have taken place. But as to the line of caution to be observed in this state of uncertainty, the Court has always expected that the inquiry should be made at some of the British ports in the Channel. It could not be that ships should be permitted to resort to the ports of the blockaded country for this information, since everyone must perceive that such a liberty would place it in the power of the enemy to determine the continuance of the blockade. The ports of the blockading country are certainly the proper ports for inquiry; and it would not be too much to expect that this precaution should be noted in the papers, and that it should be most explicitly enjoined on the master and supercargo in their instructions to obtain the information that might be necessary to fix the destination at some of the British ports in the Channel."

(e) Engaging in the colonial or coasting trade of the enemy.—Colonial trade of belligerent.—Neutrals cannot carry on trade in time of war between a belligerent and its colonies if they were excluded from such trade in time of peace.

This is known as the Rule of War of 1756, because, says Manning—

"In the war of 1756, the French, finding themselves worsted at sea and unable to carry on their colonial trade themselves, repealed their old exclusive laws which restricted foreigners from prosecuting the trade between France and the French colonies, and opened this trade to the

[1] 5 Rob., 262 (1804).

ships of the neutral Powers. But Great Britain denied that neutrals could have any right to enter upon such a traffic which was a direct interference with her maritime rights, as it might enable colonies to hold out that would otherwise fall into her power, and might enable France to withdraw seamen from her merchant service to man her fleet, which would otherwise have been obliged to be engaged in the colonial trade, or France would have risked the surrender of her colonies."[1]

The true foundation for the rule would appear to be that the neutral is not merely trading *with* the enemy, but *for* the enemy, and in thus identifying himself with the interests of the enemy he comes within the common law, which subjects the property of the enemy to seizure and confiscation.

"I understand the rule of law to be," declared Sir William Scott in the "Nancy,"[2] "that the trade between the colony and the mother country in Europe, being opened by the enemy for his own relief under the pressure of war, cannot innocently be undertaken by a neutral, nor without the hazard of rendering him liable to be considered as giving immediate aid and adherence to that belligerent to the unjust disadvantage of his adversary."

It has been alleged that this rule had not been recognized prior to 1756, but Baron de Cocceii, at the close of the seventeenth century, expounded the right of a neutral to be the maintenance of his accustomed trade during peace, thus inferentially excluding the colonial trade from which foreigners were uniformly excluded. The principle appears to be precisely the same as that by which a neutral is declared disentitled to interpose and carry on for a belligerent the coasting trade which the latter has been prevented by his antagonist from doing himself.[3]

France, for instance, herself recognized the justice of this practice, since by her *Règlements* of July, 1704, and of October, 1744, the principle contained in the rule of 1756 was enforced in the severest language.[4]

The "Immanuel"[5] was a Hamburg ship captured on a voyage from Hamburg first to Bordeaux, where she discharged part of her cargo, and having replaced it by other goods, then to the French colony of St. Domingo.

After decreeing restitution of those goods which came from Hamburg, Sir William Scott proceeded to deal with the proposition—

"Whether neutral property engaged in a direct traffic between the enemy and his colonies is to be considered as liable to confiscation?"

[1] "Law of Nations," 196.
[2] 3 Rob., 82 (1800).
[3] Reddie, "Maritime Inter. Law.," Vol. II, 446.
[4] Valin, "Ord. de la Marine," tom. II, 248–51.
[5] The "Immanuel," 2 Rob., 186 (1800).

The general rule is, he declared, that a neutral has a right to carry on in time of war his *accustomed* trade to the utmost extent of which that *accustomed* trade is capable. But this is very different from engaging in a trade in time of war which he has never enjoyed, and which he holds by no title of use or habit in time of peace, and which, in fact, he can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he set up his title.

"What is the colonial trade?" asked the learned judge. "It is a trade generally shut up to the exclusive use of the mother-country to which the colony belongs, and this to a double use: that of supplying a market for the consumption of native commodities, and the other of furnishing to the mother-country the peculiar commodities of the colonial regions."

Applying the principle of the rule of 1756, the learned judge condemned that part of the cargo taken in at Bordeaux, and ordered the remainder of the cargo and the ship to be restored, but without freight or expenses.

The "Wilhelmina"[1] was a Danish vessel, taken July, 1798, on a voyage from La Guayra to Leghorn, and carrying a cargo of colonial produce, claimed for merchants at Bremen, i.e. on a voyage from a Spanish colony to a European port, not being a port of Great Britain nor of the country to which either the ship or the cargo belonged. It had already been held, said Lord Chancellor Loughborough in delivering the judgment of the Court of Appeal—

"that by the general law of nations it is not competent in neutrals to assume, in time of war, a trade with the colony of the enemy, which was not permitted in time of peace."

Both ship and cargo were condemned.

In the earlier case of the "Minerva,"[2] an American ship captured by a French privateer on a voyage from Languera, a Spanish settlement, to Corunna, and afterwards recaptured by a British cruiser as the captors were taking her to a French port, Sir William Scott declined to condemn the ship, although the ship and cargo both belonged to the same person. It was held that the compulsory deviation did not defeat the illegality of the original voyage. But even giving the owners the benefit of this deviation, yet, said Sir William Scott—

"Being to a French port it would be a voyage from the colony of one enemy to the mother-country of an allied enemy, which I have before held is attended with undistinguishable consequences as to the cargo."

[1] 4 Rob., "Append.," p. 4 (1801).
[2] 3 Rob., 229 (March, 1801).

But the learned judge, in view of some fluctuation in the practice, restored the ship subject to forfeiture of freight and expenses. He admitted that the principle on which trade with the enemy's colony was prohibited applied equally to the ship as to the cargo. There were, however, cases in which the penalty attached in practice more strongly on the delinquent cargo than on the delinquent ship. For instance, in cases of contraband, the offence of carrying the cargo was in its own nature as great as the offence of sending it; yet a relaxation had in ordinary cases been introduced where the cargo was not the property of the owner of the ship.

Here the ship and cargo belonged to the same person, and the offence being equally known, it would be impossible to find any distinction in principle why the same penalty would not attach to both.

In the "Anna Dorothea"[1] Sir William followed the same course, although he declared himself by no means satisfied of the correctness of the practice.

The "Jonge Thomas"[2] was on a voyage from Amsterdam to Surinam after having touched at Emden, and therefore not a case of a ship going simply from a neutral country to the colonies of the enemy. The Court of Appeal declared in general terms that the illegality attached as strongly to the ship as to the cargo, and pronounced the ship subject to condemnation on the ground of the illegality of the trade between the mother-country and the colony of the enemy. Owing to these circumstances, says the late Mr. Tudor—

"In the 'Nancy Benjamin' (19 December, 1803), an American ship going from La Guayra to Hamburg, it was for some time disputed whether the Court had in any precedent pronounced the penalty of confiscation on the ship in such a voyage, or whether the favourable distinction admitted by the Court of Admiralty in the 'Minerva' was not to be applied. The Court was strongly impressed with a notion that the penalty had been enforced, holding it clearly to be within the same principle. In adverting to other cases ("Volant," Bessom, Dec., 1801), determined after the 'Wilhelmina' on the authority of that case, it appeared that several had been condemned. The principle was accordingly understood to extend to the ship as well as to the cargo."

So, too, the Rule of War of 1756 applies to the case of a neutral going on a direct voyage from the mother-country of one enemy to the colony of another enemy allied in the war. The "Rose"[3] was an American ship on a voyage from Amsterdam to Guadeloupe, Holland and France being then at war in alliance against

[1] 3 Rob., 233 (August, 1801).
[2] *Ibid.*, 233 (Nov., 1801).
[3] 2 Rob., 206 (1799).

Great Britain, and the rule equally applies to the case of a neutral carrying on a trade between the settlement of one enemy and the colonial possession of an allied enemy. The "New Adventure"[1] was the case of an American vessel with a cargo of slaves, taken on a voyage from the French settlement of Gorée to the Spanish colony of Havana, France and Spain being then at war as allies against Great Britain.

By an extension of the rule of 1756, the carrying on of a trade by a neutral from a port of his own country to a port of the colony of a belligerent was prohibited. In the French Revolutionary war the rule was applied both in the case of the vessel returning to the country of the ship and to the country of the owner of the cargo. But in the Napoleonic wars the rule was restricted to the vessel returning to the country of the ship.

Thus in the case of the "Conferenzrath,"[2] a Danish vessel captured on a return voyage from Montevideo (a Spanish colony) to Hamburg, the cargo was restored, since it was a return not to the country of the ship, but merely to the country of the owners of the cargo, who resided at Hamburg.

If the return had been, for instance, to Copenhagen, then the ship and cargo might have been liable to confiscation.

This is certainly an extension of the principle laid down by Sir William Scott himself in the "Immanuel"[3] and in the "Juliana,"[4] where the cargo which had been taken on board at the port of the country of the neutral to be delivered at a port in a colony of a belligerent was restored.

It is doubtful how far this alleged extension was really recognized or enforced in the British Court of Admiralty.

Forfeiture of Freight.—The "Rebecca"[5] was an American ship with a cargo of colonial produce, captured on a voyage between the colonies and the mother-country of the enemy. The ship had been restored by consent, and upon application for an allowance of freight Sir William Scott flatly refused to accede, declaring that in no case of this kind of direct trade between the colony and the mother-country would he give freight.

Coasting trade of belligerent.—The Rule of War of 1756 applies equally to the coasting trade of a belligerent, of which he has retained a monopoly in times of peace, and which he throws open only in time of war. See the notes to the "J. Tholen" and the "Ebenezer," 6 Rob., pp. 72, 250.

[1] 4 Rob., "Append.," p. 4 (1801).
[2] 6 Rob., 362 (1803).
[3] 2 Rob., 186 (1799).
[4] 4 Rob., 328 (1803).
[5] 2 Rob., 101 (1799).

The "Emanuel"[1] was a neutral (Danish) ship carrying on the coasting trade of the enemy by carrying salt from one Spanish port to another. In refusing the claim of the owners of the ship for freight and expenses, the ship having been restored and the cargo condemned as enemy's property, Sir William Scott inferred that this vessel was carrying on a commerce which, according to the general trading system of Spain, this Power could not pursue owing to the pressure to which her commerce had been reduced by Great Britain. On what ground, he asked, could the claimants ask for freight—

"on a voyage undertaken for the peculiar accommodation and relief of the enemy, under the distress to which the successful hostilities of the captor's country had reduced him? Is there nothing like a departure from the strict duties imposed by a neutral character and situation in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship is taken in an offence of this kind she is entitled to a claim against the captor whom she is thus counteracting and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance?

"Can there be described," continued the learned judge, "a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured to other parts when they are wanted for use? It is said that this is not importing anything new into the country, and it certainly is not; but has it not all the effects of such importation? Suppose that the French navy had a decided ascendant and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures and for the necessities of domestic life in this metropolis; is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of actual military assistance in the war?"

Three cases having been cited in argument in which freight had been allowed to vessels so employed, Sir William Scott referred to the case of the "Mercurius,"[2] in which freight was refused by the Lords of Appeal. This was a Danish vessel carrying a cargo of wheat from Dunkirk to Bordeaux.

[1] 1 Rob., 296 (1799). [2] Lords, 7 March, 1795.

"The cargo," said Sir William Scott, "was lawful under the Danish treaty, to the benefit of which the party was entitled as *bona fide* domiciled in Denmark, although a native subject of Great Britain. I am not able to say precisely how far the circumstance of his birth was an ingredient in the determination of the case; but the general rule is, that a person living *bona fide* in a neutral country is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, provided it is not inconsistent with his native allegiance. It is conformable to more ancient judgments upon the subject, which have pronounced that 'Neutrals are not to trade on freight between the ports of the enemy.' To this principle I shall adhere in the present case."

The "Atlas"[1] was an American ship claimed for merchants in America. The cargo was sent from America to Vigo, or a market, consigned to the master for sale. It was sold at Vigo to the Spanish Government, and went thence to Seville as Spanish property. In condemning the cargo and restoring the ship, freight was refused, on the ground that the ship was engaged in the coasting trade of the enemy.

It has been stated that the policy of Free Trade adopted by Great Britain, which afforded an opportunity to all the world to participate in her colonial and coasting trade, has rendered the Rule of War of 1756 obsolete,[2] and it has also been observed by a more recent writer that its practical importance will probably hereafter be much diminished by the revolution which has taken place in the colonial system of Europe.[3]

It is true, as Mr. Tudor justly observes, that as Great Britain has thrown open her colonial and coasting trade, any neutrals engaging in such trade in time of war as they had engaged in in time of peace, would only be carrying on their *accustomed* trade, and would commit no offence against the Rule of War of 1756. And so likewise with other nations, who have abandoned the monopoly of their colonial or coasting trade. But in the case of those nations who have retained such monopoly the Rule of War of 1756 is still operative, and an enemy has no right to complain that property engaged in such trade should be liable to confiscation. Nor is the neutral entitled to complain. What right has a neutral to apply to his own use the beneficial consequences of the superiority of the belligerent?

"It cannot be contended," exclaimed Sir William Scott in the "Immanuel,"[4] "to be a right of neutrals to intrude into a commerce which has been uniformly shut against them, and which is forced open merely by the pressure of war; for when an enemy under an entire inability to supply his colonies and to export their products affects to open them to

[1] 3 Rob., 299 (1801).
[2] Wheaton's "Elements," p. 819 *n*.
[3] Atlay's "Wheaton," sec. 508.
[4] 2 Rob., 186 (1799).

neutrals, it is not his will, but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure not of French councils, but of British force."

The American view of the Rule of War of 1756.—The legality of the Rule of War of 1756 has always been questioned by the Government of the United States. American jurists agree that the Dutch ships which carried on during that war the trade between France and her colonies under special licences or passes, which were granted to them only, all other neutrals being excluded, were legally liable to confiscation with their cargoes upon the ground that by such employment they were in effect incorporated into the French marine, having adopted the character and trade of the enemy and identified themselves with his interests and purposes. So also they are agreed that where a neutral is engaged in a trade which is *exclusively* confined to the subjects of a country in peace and in war, and is interdicted to all others, and cannot be avowedly carried on in the name of a foreigner, such a trade is to be considered so entirely national that it must follow the hostile situation of the country.

"But," says Wheaton, "there is all the difference between this principle and the modern British doctrine, which interdicts to neutrals during war all trade not open to them in time of peace, that there is between the granting by the enemy of special licences to the subjects of the belligerent State protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption from capture. The former is clearly cause of confiscation, whilst the latter has no such effect. The Rule of War of 1756 was founded upon the former principle, and likewise upon a construction of the treaties between Great Britain and Holland, in which, the former Power contended, was conceded to the latter a freedom of commerce only as to her accustomed trade in time of peace. The rule lay dormant through the war of the American Revolution, but was afterwards revived during the war of the French Revolution, and extended to the prohibition of all neutral traffic whatsoever with the colonies and upon the coasts of an enemy."[1]

It was, indeed, contended in the case of the "Emanuel"[2] that this principle had been largely abandoned by the Lords Commissioners of Appeal during the war of American Independence. In this case Sir William Scott declared that he was not acquainted with any decision to this effect, and he very much doubted whether any decision had given even an indirect countenance to this supposed dereliction of a principle apparently rational in itself and conformable to all general reasoning on the subject.

[1] 2 Wheaton's "Rep. Append.," 506.
[2] 1 Rob., 299 (1799).

"It is certainly true," he admitted, "that in the last war many decisions took place which then pronounced that such a trade between France and her colonies was not considered an unneutral commerce; but under what circumstances? It was understood that France, in opening her colonies during the war, had declared that this was not done with a temporary view relative to the war, but on a general and permanent purpose of altering her colonial system and of admitting foreign vessels universally and at all times to a participation of that commerce. Taking that to be the fact (however suspicious its commencement might be during the actual existence of a war), there was no ground to say that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and, therefore, in the case of the 'Verwagtig'[1] and in many other succeeding cases, the Lords decreed payment of freight to the neutral shipowner. It is fit to be remembered on this occasion that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of a war, for hardly was the ratification of peace signed, when she returned to her ancient system of colonial monopoly. In the present war I am not aware that any judgments of the Supreme Court yet pronounced have receded from the principle, except in cases and under circumstances in which a respect to public stipulations and treaties require that the application should be limited; the general principle I take to be entire and untouched, as far as it relates to that trade of the colonies."

From the simple rule which prohibits neutrals from interposing in the trade between the mother-country and her colonies, or in the coasting trade of the belligerent from which they were excluded in time of peace, a series of innovations, contends Wheaton, have sprung. First, the prohibition of trade between neutrals from a port in their own country and the colonies of a belligerent; secondly, the prohibition of trade by neutrals from the port of an enemy to the port of another; and, lastly, the prohibition of all trade whatever by a neutral between the ports of a belligerent, but with a cargo from the neutral's own country.

And, indeed, some writers attacked the rule itself. The Government of the United States in its diplomatic correspondence constantly protested in the most emphatic manner against its legality, and insisted that it was an attempt to establish "a new principle of the Law of Nations," and one which subverted

"many other principles of great importance which have heretofore been held sacred among nations." Neutrals were entitled "to trade, with the exception of blockades and contraband, to and between all ports of the enemy and in all articles, although the trade should not have been opened to them in time of peace."[2]

[1] Lords, 28 February, 1786. This was a Danish vessel bound from Marseilles to Martinique and back to Europe, captured on the outward voyage.

[2] Mr. Monroe's letter to Lord Mulgrave 23 September, 1805, and Mr. Madison's letter to Messrs. Monroe and Pinckney, 17 May, 1806; Phillimore, "Inter. Law," 2nd ed., Vol. III, 378.

That such views are inconsistent with any known principle of International Law must be clear from the enunciation of the law by Sir William Scott, but the same remark may not be so applicable to the extensions of the rule of which Mr. Wheaton complained.

In a letter to that learned jurist in 1816, Mr. Justice Story gives his views on the matter in dispute:—

"My own private opinion certainly is, that the coasting trade of a nation, in its strict character, is so exclusively a national trade, that neutrals can never be permitted to engage in it during war without being affected with the penalty of confiscation. The British have unjustly extended the doctrine to cases where a neutral has traded between the ports of the enemy with a cargo taken in at a neutral country. I am as clearly satisfied that the colonial trade between the mother-country and the colony where that trade is thrown open merely in war, is liable in most instances to the same penalty. But the British have extended this doctrine to all intercourse with the colony, even from or to a neutral country, and herein, it seems to me, they have abused the rule. This at present appears to me to be the proper limits of the rule, as to the colonial and coasting trade, and the rule of 1756 (as it was at that time applied) seems to me to be well founded, but its late extension is reprehensible."[1]

During the Russo-Japan war the German ship "Thea" was captured by Russia on the ground that she was engaged in the Japanese coasting trade, and that this had been thrown open on the outbreak of war.

(*f*) **Proceeding as a vessel equipped for war to a belligerent.**—When a vessel is equipped for war and is sent to a hostile port with the intention of selling her to a belligerent, she will be condemned as contraband.

The "Brutus"[2] was a vessel then recently built at Salisbury, in the State of Massachusetts, pierced for fourteen guns, but with only two mounted for defence, as it was alleged, against French privateers. She had been sent to Havana with instructions to the master "that he should sell her *or* take goods or freight at his discretion, but that the owners should prefer the sale rather than freighting her, as she was not calculated for such employ unless necessitated." The survey taken at Halifax showed

"that her hull, masts, yards, rigging, and sails appeared in every respect as fitted for a ship of war; that she had shot lockers fitted to each port and netting stanchions for stowing hammocks for quarters with nettings fixed fore and aft; that she was pierced for fourteen guns, with ports

[1] "Life and Letters of Joseph Story," Vol. I, 287.
[2] 5 Rob., "Append." (27 July, 1804).

calculated for guns of four pounds, with rings and eyebolts, and that her sides were regularly built for quarters agreeably to the established way of building with bow and stern chase ports and a capstan complete for heaving up the anchor instead of a windlass."

The Court of first instance declared that the vessel was built for purposes of war and not of peace, and condemned her as contraband of war.

This sentence was affirmed by the Lords of Appeal. In three previous cases their lordships restored the vessels. The "Fanny" and the "Neptune" were vessels of a more ambiguous construction, but were going to Havana with directions to be sold there. They were condemned as contraband by the Vice-Admiralty Court of the Bahamas. Upon appeal, the Lords of Appeal, in consideration of the equivocal nature of their character and the employment in trade in which they had been actually engaged, and of the occasion for selling arising out of the attendant circumstances, reversed the sentence and ordered restitution. The "Raven" was a French privateer, which had been condemned as such at New York. It appeared that the purchaser had bought for purposes of trade, and had used his best endeavours to make her fit for that service. Finding her still unsuitable, he was on that account intending to re-sell her. Restitution was decreed by the Court of Appeal. From these decisions Dr. Christopher Robinson, the learned reporter, formulated the rule—

"That though the principle of considering the sale of ships of war to the enemy as contraband is strictly held by the decisions of the Court of Appeal, the application of the principle has been restricted to cases in which no doubt existed as to the character of the vessel or the purpose for which it was intended to be sold."[1]

In the case of the "Richmond,"[2] Sir William Scott said :—

"Here was an avowed intention of going to sell a ship to a belligerent, which, in time of war, is at least a very suspicious act—and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for the purposes of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up, to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied."

And it would seem to be unnecessary to constitute this offence, that the ship should be actually equipped for war, if she is capable of being adapted, or readily adapted, for warlike purposes. If,

[1] 5 Rob., "Append." [2] *Ibid.*, 325 (7 Dec., 1804).

for instance, she was capable of or adaptable for the transport of troops, or even perhaps of military stores.[1]

Although it is an offence against International Law to furnish a belligerent with a ship of war, or with a vessel capable of being converted into a ship of war (which is *par excellence* contraband in its most aggravated form), yet such an act is not a violation of national neutrality, unless the subject of some convention, nor is it an offence against the municipal law of the offender, unless specially prohibited by some special enactment.

It was held by the Supreme Court of the United States in the case of the "Santissima Trinidad,"[2] that the sending of armed vessels or of munitions of war from a neutral port, Baltimore, to a belligerent port, Buenos Ayres, a colony which had revolted from, and was at war with, Spain, for sale as articles of commerce, was illegal only in so far as it rendered the property if captured liable to confiscation.

In delivering the judgment of the Court, Mr. Justice Story said:—

"It is apparent that though equipped as a vessel of war she was sent to Buenos Ayres on a commercial adventure—contraband indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize and for being engaged in a traffic prohibited by the Law of Nations. But there is nothing in our laws or in the Law of Nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes and the sale at Buenos Ayres to have been a *bona fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after sale was for that cause alone invalid."

This view was expressly followed by Lord Westbury in *ex parte Chevasse, in re Grazebrook*,[3] where he said:—

"I take this passage to be a very correct representation of the present state of the law in England also. For if a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war *bona fide* on his own account as an article of merchandise and not under or by virtue of any agreement, understanding, or concert with a belligerent Power, he may lawfully, if acting *bona fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act."

[1] Atlay's "Wheaton," sec. 501 *f.*
[2] 7 Wheaton, 283 (1822).
[3] 34 L. J. Bank, 17 (1865).

In the same judgment the Lord Chancellor gives the following admirable summary of the general principles of the law:—

"In the view of international law," said Lord Westbury, "the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations and they become belligerents, neither belligerent has a right to impose or to require a neutral Government to impose any restrictions on the commerce of its subjects. The belligerent Power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture when found on the sea, the high road of nations, any munitions of war which are destined and in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral State of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal. There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize *in transitu* munitions of war while being conveyed by a neutral to his enemy, speak of this act of transport by the neutral as unlawful and prohibited commerce.

"But this commerce which was perfectly lawful for the neutral with either belligerent before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent Power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequences beyond his judicial condemnation of the ship and cargo, nor can he make it the subject of complaint."

In support of these views, the learned Chancellor referred to the following passage from Vattel, in which, speaking as a belligerent, he said:—

"Let us now discuss another case—that of neutral nations resorting to my enemy's country for commercial purposes. It is certain that as they have no part in any quarrel they are under no obligation to renounce their commerce for the sake of avoiding to supply my enemy with the

means of carrying on the war against me. Should they affect to refuse selling me a single article while at the same time they take pains to convey an abundant supply to my enemy, with an evident intention to favour him, such partial conduct would exclude them from the neutrality they enjoyed. But if they only continue their customary trade, they do not thereby declare themselves against my interest; they only exercise a right which they are not under any obligation to sacrifice to me. On the other hand, whenever I am at war with a nation, both my own safety and welfare prompt me to deprive her as far as possible of everything which may enable her to resist or injure me. In this instance the law of necessity exerts its full force. If that law warrants me on occasion to seize what belongs to other people, will it not likewise warrant me to intercept everything belonging to war which neutral nations are carrying to my enemy? Even if I should, by taking such measure, render all those neutral nations my enemies, I had better hazard that than suffer him who is actually at war with me thus freely to receive supplies and collect additional strength to oppose me. It is therefore very proper and perfectly conformable to the Law of Nations (which disapproves of multiplying the causes of war) not to consider those seizures of the goods of neutral nations as acts of hostility.

"When I have notified to them my declaration of war against such or such a nation, if they will afterwards expose themselves to risk in supplying her with things which serve to carry on war, they will have no reason to complain if their goods fall into my possession; and I, on the other hand, do not declare war against them for having attempted to convey such goods. They suffer indeed by a war in which they have no concern; but they suffer accidentally. I do not oppose their right; I only exert my own; and if our rights clash with and reciprocally injure each other, that circumstance is the effect of inevitable necessity. Such collisions daily happen in war."[1]

Vattel must here be considered, observed Lord Westbury, as speaking of the acts of the subjects of a neutral Power, and not of a neutral Government itself, for the supplying of warlike stores to a belligerent by a neutral State would clearly be a breach of neutrality.

The same doctrine as to the freedom of commerce to be enjoyed by the subjects of a neutral State has been more explicitly stated by Chancellor Kent.

"It is a general understanding," says this jurist, "grounded on true principles, that the Powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant and without any imputation of a breach of neutrality in the neutral sovereign himself.[2] It was contended on the part of the French nation in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent Powers. But it was successfully shown on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry,

[1] Liv. III, VII, sec. 3.
[2] See Vattel, liv. III, VII, sec. 113.

themselves, to the belligerent Powers contraband articles subject to the right of seizure *in transitu*.[1] This right has since been explicity declared by the judicial authorities of this country.[2] The right of the neutral to transport and of the hostile Power to seize are conflicting rights, and neither party can charge the other with a criminal act."[3]

As a consequence of this doctrine, it follows that all contracts relating to such transactions are valid and may be enforced in the country of the neutral by the parties thereto. In *ex parte Chavasse, in re Grazebrook* already referred to, Lord Westbury held that a contract to share in a joint adventure to carry contraband goods to a port of a belligerent, and then to dispose of the goods and convert them into others to be re-exported from the belligerent port, though it was blockaded, was not an illegal contract, but constituted a valid partnership in the adventure, and that the Courts of this country were bound to entertain proceedings for an account between the partners or their assignees if so required by either partner or his assignee.

The same view was taken in *Hobbs* v. *Henning*,[4] which was a claim for the amount covering a policy of insurance upon articles which had been condemned as contraband of war by the Courts of the United States upon the doctrine of continuous voyage.

The "Helen"[5] was a case in which the master sued for wages upon an agreement between himself and the owners of the ship—an agreement which had for its object the breaking of the blockade instituted by the Federal Government of the United States of the ports of the Confederate States. The defendants, in their answer, pleaded that such an agreement was an illegal contract.

In the course of his judgment, Dr. Lushington referred to the case of *ex parte Chavasse, in re Grazebrook*, in which Lord Westbury had decided a contract of partnership in blockade running was not contrary to the municipal law of England. But he held that a decision of the Lord Chancellor, although it was to be treated with the greatest respect, was not absolutely binding upon the Court of Admiralty, which is only bound to obey the rulings of the House of Lords, the Privy Council, and the Courts of Common Law upon the construction of a statute. In considering the interpretation of the word "illegal," Dr. Lushington said:—

"The true meaning, I think, is that all such contracts are illegal so far

[1] M. Adet's letter to Mr. Pickering, 11 March, 1796; Mr. Pickering's letters to M. Adet, 20 January and 25 May, 1796; circular letter of the Secretary of the Navy to the Collectors, 4 August, 1793.

[2] *Richardson* v. *Maine Ins. Co.*, 6 Mass. 113; the "Santissima Trinidad," 7 Wheaton, 283.

[3] "Commentaries," Vol. I, 142.

[4] 17 C. B., 791 (1864).

[5] L. R., 1, Adm. and Ecc., 1 (1865).

that if carried out they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law for breach of blockade or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was *ab initio* wholly and absolutely illegal, both by the Law of Nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading Power is: 'Mine is a just and necessary war,' a matter which, in ordinary cases, a neutral cannot question; 'I must seize contraband, I must enforce blockade, to carry on the war.' In this state of things there has been a long and admitted usage on the part of all civilized States—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the Law of Nations. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do. . . . When all the necessary conditions [of blockade] are satisfied, then by the usage of nations the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral State. It has never been a part of admitted usage that such voyage should be deemed illegal by the neutral State, still less that the neutral State should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral, "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before. This doctrine is not inconsistent with the maxim that the Law of Nations is part of the law of the land. The fact is, the Law of Nations has never declared that a neutral State is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all?"

The learned judge, after passing in review the American authorities, found that principle, authority, and usage united in calling him to reject the alleged doctrine that to carry on trade with a blockaded port was, or ought to be, a municipal offence by the Law of Nations, thus agreeing with the Lord Chancellor. And since the attempt to introduce this novel doctrine came from an avowed *particeps criminis*, who sought to benefit himself by it, he ordered him to pay the costs of his experiment.

Two writers on insurance, Phillips and Duer, maintain a con-

trary opinion to the one here pronounced. The former intimates that the trading in articles contraband of war is illegal by the Law of Nations, which forms part of the municipal law of every State, and that the property cannot therefore be the lawful subject of insurance even in a neutral State.[1] The latter, whilst contending with much ability and acuteness against the view taken here, admits, however, that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal States of Continental Europe, and, he might have added, of America.[2]

It is obvious that all insurances on articles contraband of war are wholly void and incapable of being enforced in the Courts of the belligerent country whose prohibition has been disregarded.[3]

In *Gibson* v. *Service*,[4] an English vessel, the "Croydon," took on board at Liverpool a cargo of gunpowder and arms, under a bond and a licence to trade them only on the coast of Africa. The "Washington" was an American ship, also lying at Liverpool, and before the two ships sailed their respective owners made an agreement whereby the "Washington" was to take over part of the cargo of the "Croydon" off the coast of Africa. Before leaving Liverpool the "Washington" was insured on her voyage from the coast of Africa to Charleston. This was an action upon the policy of insurance. This agreement, said Gibbs C.J., was illegal. It was in effect an illegal exportation by the "Washington," which had given no security that the goods should be trafficked in on the African coast. If such an agreement could take effect on the coast of Africa, so might it at the mouth of the Thames, and the consequence would be that an American vessel would get a full loading of arms and gunpowder at the mouth of the river and go off insured by English underwriters.

The American view.—The American doctrine is precisely similar. In considering how far a contract of insurance became void in consequence of the nature of the voyage, Chief Justice Parsons, in *Richardson* v. *Maine Insurance Company*,[5] said:—

"When the sovereign of the country to which the ship belongs shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit,

[1] "Insurance," 2nd ed., Vol. I, 101, 429.
[2] "Marine Insurance," Vol. I, Act. vii.
[3] Arnould's "Insurance," 2nd ed., Vol. I, 765.
[4] 5 Taunt, 133 (1814).
[5] 6 Mass., 102 (1809).

and all insurance on such voyages by his subjects are void, whether the assurers had or had not knowledge of the prohibition. For the law will not allow any effect to a contract made to protect a traffic which it has prohibited.

"Another class of illicit voyages are those which are prohibited by the trade laws of a foreign State, whether those laws wholly exclude the merchant ships of other States from its ports, or only prohibit the importation or exportation of particular species of goods. Because the municipal laws of any State have not the force of laws without its jurisdiction; voyages prohibited in one State are not in other States deemed for that reason illegal. These voyages may therefore be the subject of insurance in any State in which they are not prohibited. And if the assurer will expressly insure against seizure for illicit trade, or if, with a full knowledge of the nature of the voyage, he will insure it without making any exception, he will be bound to indemnify the assured for the losses arising from the breaches of the trade laws of foreign States. But although he may not take upon himself these losses, and thus be irresponsible for them, yet he is answerable for any other losses insured against, because the policy is not void.

"The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent Powers. And here, it is said, that these voyages are prohibited by the Law of Nations, which forms a part of the municipal law of every State; and consequently that an insurance on such voyages, made in a neutral State, is prohibited by the laws of that State; and, therefore, as in the case of an insurance or interdicted commerce, is void.

"That there are certain laws which form part of the municipal laws of all civilized States regulating their mutual intercourse and duties, and thence called the Law of Nations, must be admitted; as, for instance, the Law of Nations affecting the rights and the security of ambassadors. But we do not consider the Law of Nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized State that if the subject of a neutral Power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the others may rightfully seize and condemn them as prize. But we do not know of any rule established by the Law of Nations that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country.

"When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that if they are taken in it he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the Power at war *does not impute to him* these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli* they may be rightfully seized and condemned. It is one of the cases where two conflicting rights may exist, which either party may exercise, without charging the other with doing wrong. As the transportation is not prohibited by the

laws of the neutral sovereign, his subjects may lawfully be concerned in it; and as the right of war authorizes a belligerent Power to seize and condemn the goods, he may rightfully do it. . . .

"But we know of no case where the neutral merchant has been punished by his own sovereign for his contraband shipments. If he will adventure on the trade, and his effects are seized and condemned as prize, to this penalty he must submit, for his sovereign will not interfere, because the capture was lawful. And it may be further observed, that if the exportation of contraband goods from a neutral country to a port of either of the Powers at war is a trade, which from its nature is prohibited by the laws of the neutral sovereign, then the policy on such goods would be void, and the assurer would be exempted from any loss or damage arising even from the danger of the sea. But an exemption of this kind is not founded on any sound principle, nor is it supported by any usage."

Upon the question of knowledge by the assurer, the learned judge said:—

"But if the goods contraband of war are on cargo, the assurer is not responsible for their capture and condemnation on that account, unless either with a full knowledge of the nature of the goods and of the voyage, or by an express undertaking he shall insure them against such capture."

In the case of goods bound to a blockaded port, if, said the learned judge—

"before the commencement of the risk the port is known to be blockaded, and the assurer does not insure against condemnation for contraband trade, the policy is good as to all the risks insured against, but the assurer is not responsible for any loss arising from such condemnation. So if the port is not known to be blockaded until the ship is on her passage, the assurer is not answerable for such condemnation if, after notice, the ship continues her voyage and is captured. But if the assurer has insured against a condemnation for contraband trade, the policy is good, and he must answer for any loss arising from a condemnation for that cause, whether the trade be contraband because the goods are munitions of war, or because they are destined or bound to a port known to be blockaded."

We have already referred to the "Santissima Trinidad," where Mr. Justice Story came to the same general conclusion.

(*g*) **Equipping, furnishing, fitting out, or arming vessels, or allowing the same to be so equipped, furnished, fitted out, or armed for the use of belligerents.**—This is an offence not only by International Law, but by the municipal law of those States which have passed enactments for its prohibition.

The general principle upon which it is based is that of neutrality. Neutrals are those who do not take any part in the contest, and who remain the common friends of both parties without favouring the arms of the one to the prejudice of the other.

"As long," says Vattel, "as a neutral nation wishes securely to enjoy the advantages of her neutrality, she must in all things show a strict impartiality towards the belligerent Powers; for should she favour one of the parties to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of his enemy. Her neutrality would be a fraudulent neutrality of which no nation will consent to be the dupe."

The impartiality to be observed, explains Vattel, includes two duties, viz.: (1) To give no assistance—not any assistance, but no assistance—when there is no obligation to give it, by furnishing troops, arms, munitions of war, or anything of direct use in war. (2) In whatever does not relate to war, not to refuse to one belligerent, on account of the quarrel, that which she grants to the other.[1]

But even in articles relating to war the same principle is involved. The rights of neutrals to carry on their trade cannot be altogether abrogated.

"If a nation," says Vattel, by which he means its subjects, "trades in arms, timber for shipbuilding, ships and warlike stores, I cannot take it amiss that it sells such things to my enemy, provided it does not refuse to sell them to me also at a reasonable price. It carries on its trade without any design to injure me, and by continuing it in the same manner as if I were not engaged in war, it gives me no just cause of complaint."[2]

United States of America.—Since the earliest legislative prohibition of this offence is furnished by the United States of America, and since our own legislation is based upon this example, it is more convenient to deal with the American law first.

This measure, which was passed by Congress on 5 June, 1794, was the result of the attempt on the part of M. Genêt, the Minister of France, by taking advantage of the intense sympathies of the people of the United States with the revolutionary party in France, to involve the United States in the war then proceeding between France and Great Britain and her allies.[3]

The object of the statute was to preserve the neutrality of the United States as enjoined by the law of nations, and the mischief aimed at was the arming and equipping vessels in the ports of the States, and the sallying out thence in warlike array to cruise and commit hostilities upon foreign nations with which the States were at peace.

The keynote to this legislation is to be found in President

[1] "Law of Nations," Book III, sec. 104.
[2] *Ibid.*, Book III, sec. 110.
[3] Marshall's "Life of Washington," Vol. V, 409–411, 427–433, 441–3. The President's message 3 December, 1793, 1 U.S. State Papers, 39, 40; Proclamation of Neutrality, *Ibid.*, 44–6.

Washington's Annual Address to Congress on 3 December, 1793, in which he said :—

"The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military services, offensive or defensive, is deemed unlawful."

This recommendation was passed into law by the Senate by the casting vote of Vice-President Adams, and was the first instance as stated of municipal legislation in support of this obligation of neutrality, and forms a remarkable advance in International Law. And although this international obligation had been declared by Chief Justice Jay in his charge to the jury at Richmond, 22 May, 1793,[1] and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year,[2] to be capable of being enforced in the courts of the United States, criminally as well as civilly, without further legislation, yet it was deemed advisable to pass the Act in view of the controversy over that position, and moreover in order to provide a comprehensive code in prevention of acts by individuals within the jurisdiction inconsistent with the authority of the Government, as well as hostile to friendly Powers.

By section 3 of the Act of Congress of 5 June, 1794, it is enacted :—

"That if any person shall within any of the ports, harbours, bays, rivers, or other waters of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or State to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or State with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanour, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars, and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of any person who shall give information of the offence, and the other half to the use of the United States."

And by section 4 it is further enacted :—

"That if any person shall within the territory or jurisdiction of the United States increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting

[1] Wharton's "State Trials," 49, 56. [2] *Ibid.*, 66, sec. 4.

the force of any ship of war, cruiser, or other armed vessel which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of a foreign prince or State, or belonging to the subjects or citizens of such prince or State, the same being at war with another foreign prince or State with whom the United States are at peace, by adding to the number or size of the guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person so offending shall, upon conviction, be adjudged guilty of a misdemeanour, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year."[1]

This statute was limited to two years, but was made perpetual by the Act of Congress of 24 April, 1800.

The immediate occasion of the enactment of the Act of 1817 appears to have been a communication dated 20 December, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore in the service of the Buenos Ayres insurgents to act against Portugal, and soliciting "the proposition to Congress of such provisions of law as will prevent such attempts for the future." On 26 December, President Madison sent a special message to Congress in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerents, and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislation.

Thus on March 3, 1817,[2] an Act of Congress was passed which substantially re-enacted that of 1794.

This statute increased the maximum penalty to ten thousand dollars and ten years' imprisonment in the case of fitting out and arming, and contained provisions requiring owners of armed vessels quitting the ports of the United States—such owners being wholly or partly citizens of the United States—to enter into bonds that such vessels should not be employed against countries with whom the United States were at peace. The statute also contained provisions giving powers to the collectors of Customs to detain any such vessels. To the words "employed in the service of any foreign prince or State" in sections 2, 3, and 4 of the Act of 1794 were added "or of any colony, district, or people."

[1] Statutes at Large, U.S.A., Vol. I, 383, chap. L.
[2] *Ibid.*, Vol. III, p. 370, chap. XLVIII.

These words, according to Mr. Dana, were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "State."

Numerous complaints of the inefficiency of these statutes were repeatedly made by the representatives of the Spanish and Portuguese Governments. The Spanish Secretary of State, writing on 2 November, 1817, declares that the Act of 1817 has in nowise lessened the abuses by which the laws are evaded, and render entirely illusory the laudable purposes for which they were enacted. Privateers issued from all the ports of the Union, especially from New Orleans and Baltimore, with the intention of attacking Spanish commerce, and with their armaments concealed in the hold. On the other hand, armed insurgent vessels were allowed entry into the ports of the Union and supplied with all necessaries, enjoying greater privileges than vessels of independent powers.[1]

These continual complaints led to fresh legislation. The statute of 1817 was repealed by the Act of Congress of 20 April, 1818,[2] which re-enacted section 3 of the Act of 1794, with the exception that the maximum penalty of five thousand dollars was altered to ten, and the penalty of ten years' imprisonment reduced to three. By section 4 the same offence committed outside the limits of the United States by any of its citizens was punished by a maximum penalty of ten thousand dollars and ten years' imprisonment.

By section 5 the provisions as to augmenting remained the same as in section 4 of the Act of 1794.

It was enacted by section 10—

"That the owners or consigners of every armed ship or vessel sailing out of the ports of the United States belonging wholly or in part to citizens thereof, shall enter into bond to the United States with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with whom the United States are at peace."

By section 11 the collectors of Customs are

"required to detain any vessel manifestly built for warlike purposes and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board or other circumstances shall render it probable that such vessel

[1] American State Papers, Vol. V, p. 199.
[2] Statutes at Large, U.S.A., chap. LXXXVIII, Vol. III, p. 447.

is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this Act."

Almost immediately after the enactment of the Act of 1794 a prosecution was instituted against one Guinet, who had been concerned in fitting out and arming "Les Jumeaux"[1] as a privateer at Philadelphia. This vessel was originally a British vessel, but when she entered Philadelphia with a cargo of sugar and coffee in 1794 she was entirely owned by French subjects. At this date she had only four out of twenty portholes open, but whilst at Philadelphia the remainder were opened, and she was fitted up as a ship of war.

In considering the effect of the cases upon the statutes, it must be observed that by the treaties between the United States and the French Republic the latter was granted the privilege of taking her prizes captured on the high seas into the port of the former for adjudication by her own consular courts established within the United States. And this right of adjudication was entirely exclusive of any jurisdiction exercisable by the Government of the United States. In the United States *v.* Richard Peters,[2] when a French vessel, the "Cassius," had captured the "William Lindsay" and brought her into Port de Paix, a prohibition was granted against the district judge forbidding him to proceed further, and ordering him to release the "Cassius" and her captain.

In this case the vessel and cargo were claimed as the property of an American citizen, and it was alleged that the captain of the "Cassius" was an American citizen, and that the vessel was originally equipped and fitted out for war in the port of Philadelphia, contrary to the laws of the United States and the laws and usages of nations.

The principal question here was whether the courts of the United States could sustain a claim for compensation *in rem* against the capturing vessel for an asserted illegal capture as prize on the high seas, when the prize was not brought into the ports of the United States, but was carried into a port *infra praesidia* of the captors.

It is apparent, said Mr. Justice Story in the "Santissima Trinidad,"[3] that the jurisdiction in cases of this nature exclusively belongs to the courts of the capturing Power, and that neither the

[1] U. S. *v.* Guinet, "Les Jumeaux," 2 Dall., p. 328.
[2] 3 Dall., 121 (1795). [3] 7 Wheat., p. 350.

public ships of a nation nor the officers of such ships are liable to be arrested to answer for such captures in any neutral court.

It was laid down in the case of the "L'Invincible"[1] that a public ship belonging to a foreign State was exempt from proceedings *in rem* for damages in the courts of the United States for illegal captures on the high seas, in violation of the neutrality of that Power, but that this in no way exempted her prizes in the ports of the United States from the full exercise of the jurisdiction of the United States.

The principles of the general rule were clearly stated in Talbot *v.* Jansen.[2] France was then at war with the United Netherlands, and both were in treaty with the United States. On 16 May, 1794, the "Magdalena," a Dutch vessel bound from Curaçoa to Amsterdam, was captured by a French privateer, "L'Ami de la Liberté," commanded by Ballard. Next day another French privateer, "L'Ami de la Point à Petre," under Captain Talbot, turns up, and both having put prize crews on board the "Magdalena" brought her into Charleston. It was held by the Court that both capturing vessels were the property of American citizens, that Ballard was an American citizen and had no lawful commission; that Talbot was also an American citizen, and although he had a commission from the French Admiral, he had no commission for the purpose of such a capture; that there was fraud and collusion between Ballard and Talbot; that the "Ami de la Liberté" was fitted out and armed in the United States, and that consequently the capture was unlawful, and the district court entitled to hold inquiry.

"Shall not property," asked Mr. Justice Cushing, "which he has thus taken from a nation at peace with the United States and brought within our jurisdiction be restored to its owners? Every principle of justice, law, and policy unite in decreeing the affirmative, and there is no positive compact with any Power to prevent it. . . ."

The Court unmistakably held the acts of Ballard and Talbot an offence both in Municipal and International Law quite apart from the statute.

"This is so palpable a violation," said Mr. Justice Iredell, "of our own law (I mean the common law of which the law of nations is a part as it subsisted either before the Act in Congress on the subject, or since that has provided a particular manner of enforcing it), as well as of the law of nations generally, that I cannot entertain the slightest doubt that *primâ facie* the district court had jurisdiction."

Thus the proposition was laid down that the capture of a vessel belonging to a belligerent Power by an American citizen

[1] 1 Wheat., 238 (1816) [2] 3 Dall., 133 (1795).

under a foreign commission, though he set up an Act of expatriation, is unlawful, and the Court will decree restitution of any property captured by him and brought *infra praesidia* of the Court.

The following cases upon augmentation may be shortly referred to:—

The British Consul *v.* the ship "Mermaid"[1] was a case of claim for restitution on the ground that the capturing ship had been fitted out or had had her force augmented within the United States unlawfully and in violation of neutral rights. Her quarter-deck had been taken away, all decayed timbers and planks repaired, and her ports opened, but it was found as a fact that it was done without any intent to violate the law.

In the British Consul *v.* schooner "Nancy,"[2] where a privateer had increased her crew from ten to thirty or more, and there was the strongest presumption that she had taken her guns on board at Charleston, restitution of the prize "Nancy" and her cargo was decreed on the ground that such augmentation of force was a breach of neutrality and of the law of nations.

In Benjamin Moodie *v.* the ship "Brothers,"[3] the question was whether any addition of equipment solely applicable to war had been made within the fifth section of the statute. The vessel was a privateer, and when she was repaired two of her ports were altered. It was held that such alteration was not an additional equipment, the statute only prohibiting such additions as amounted to an augmentation of her warlike force.

In Geyer *v.* Michel,[4] the "Den Onzekern," a Dutch vessel, was captured by the "Citizen of Marseilles," which was alleged to have been fitted out, armed and equipped for war in the port of Philadelphia, and put to sea without a lawful commission, and whilst in the river of Delaware her force was augmented by opening certain other portholes and mounting other guns and providing herself with other stores. Upon the ground of augmentation, restitution was ordered by the judge of the District Court, but upon appeal with further evidence to the Supreme Court of the United States this was reversed for reasons not stated, though apparently upon the grounds that there was no evidence of real augmentation, and that the augmentation of a French ship of war within the jurisdiction of the United States was not sufficient either by municipal or international law to alter her warlike character and to destroy the conventional right of asylum for herself and her prizes.

[1] Bee's Amer. Adm. Rep., 69 (1795).
[2] *Ibid.*, 73 (1795).
[3] *Ibid.*, 76 (1795).
[4] 3 Dall., 285 (1796).

The case of Moodie *v.* the "Betsey"[1] was a claim for the restitution of a prize owned by British subjects, captured by the same privateer, and proceeded upon the same facts as were proved in the District Court in Geyer *v.* Michel. In decreeing restitution, the learned judge said that if a prosecution had been instituted against the captain of the "Citizen of Marseilles," or against any of the persons concerned in increasing, augmenting, or procuring to be increased or augmented the force of the vessel, a conviction must have followed under the Act of 1794. Under that Act a penalty of fine and imprisonment was declared as a punishment for a breach of the sovereignty and neutrality of the United States.

"In the case of Janson *v.* Talbot," continued the learned judge, "I stated that this Court, by the law of nations, has jurisdiction over captures made by foreign vessels of war, of the vessels of any other nation with whom they are at war, provided such vessels were *equipped* here in breach of our sovereignty and neutrality, and the prizes are brought *infra praesidia* of this country. By the law of nations, no foreign Power, its subjects, or citizens has any right to erect castles, enlist troops, or equip vessels of war in the territory or ports of another. Such acts are breaches of neutrality, and may be punished by seizing the persons and property of the offenders. Vessels of war so equipped are *illegal ab origine*, and no prizes they make will be legal as to the *offended Power* if brought *infra praesidia*. The seizure and restitution of such prizes are what the laws of neutrality justly claim. You must either permit both parties to equip in your ports, or neither. Should either equip without your consent, the least you can do is to divest them of the prizes they may have thus illegally taken, and restore them to the other party, or else permit them to equip also."

In the cases of Moodie *v.* the "Alfred"[2] and Moodie *v.* the "Phœbe Anne,"[3] the Supreme Court refused to order restitution of two British vessels captured by French privateers; in the first, apparently on the ground that although some of her equipments were calculated for war, they were also frequently used by merchantmen; and in the second, that by Article XIX of the Treaty of 1782 with France, French vessels—whether public or private, warships or merchantmen—were entitled, on any urgent necessity, to enter the ports of the United States and to be supplied with all things needful for repair. In this case, the privateer only underwent a repair.

"The mere replacement of her force," said Chief Justice Elsworth, "cannot be a material augmentation, even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution."

[1] 3 Dall., 288 (1796).
[2] *Ibid.*, 307 (1796).
[3] *Ibid.*, 319 (1796).

The "Alerta"[1] was the case of a Spanish vessel captured by a French privateer in June, 1810, which had been armed and equipped and manned by sundry American citizens and inhabitants of New Orleans. In decreeing restitution, Washington J. laid down the general proposition that if the capture be made within the territorial limits of a neutral country into which the prize is brought which had been illegally equipped in such neutral country, the Prize Courts of such neutral country not only possess the power, but it was their duty to restore the property so illegally captured to the owner. This was necessary for the vindication of their own neutrality. A neutral might, admitted the learned judge, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission, the subjects of belligerent Powers have no right to equip vessels of war, or to augment their force either with arms or with men within the territory of such neutral nation. Such unauthorized acts violate her sovereignty and her rights as a neutral. All captures made by means of such equipments are illegal in relation to such nation, and it is competent to her courts to punish the offenders; and in case the prizes taken by her are brought *infra praesidia*, to order them to be restored.

"These principles," declared the learned judge, "are believed to be fully warranted by the general law of nations, by the decisions of the courts of this country, and by the laws of the United States.

"By the Act of June, 1794, the enlisting within the territory of the United States persons to serve as soldiers and marines on board any vessel of war or privateer in the service of any foreign State, with the exception of the subjects of such foreign State transiently within the United States; the fitting out and arming any vessel in the service of a foreign prince or State at war with any other nation which is at peace with the United States, and the increasing or augmenting the force of any armed vessel of war in such foreign service by adding to the number of her guns and the like, are declared to be offences against the United States, and are punishable by fine and imprisonment; and the ninth section of the law provides for the detention of all such vessels as have been so fitted out, or as have so increased or augmented their force, together with such prizes as they may have made, in order to the execution of the prohibitions and penalties prescribed by that Act, and to the restoring of such prizes in cases where restoration shall have been adjudged."

In the case of the "Divina Pastora"[2] it was held that the Government, having recognized the insurgent Spanish colonies as belligerents, was bound to treat captures made under their commissions like any other captures, and that their legality could not be questioned in the courts of the United States. But it

[1] 9 Cranch, 359 (1815). [2] 4 Curtis, 345 (1819).

was declared in the case of the "Estrella"[1] that, apart from any Act of Congress, the Courts had authority under the law of nations to decree restitution of any property captured in violation of their neutrality if brought *infra praesidia*. This principle was again applied in the case of "La Amistad de Rues."[2] In delivering judgment, Story C.J. observed:—

"We entirely disclaim any right to inflict such damages, and consider it no part of the duty of a neutral nation to interfere upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. Each has an undoubted right to exercise all the rights of war against the other, and it cannot be a matter of judicial complaint that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own Government exclusively for any excess or irregularity in their proceedings, and a neutral nation ought no otherwise to interfere than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. Neutral nations may, indeed, inflict pecuniary or other penalties on the parties for any such violation; but it thus does it professedly in vindication of its own rights, and not by way of compensation to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is that the neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports; but beyond that it is not obliged to interpose between the belligerents. If indeed it were otherwise, there would be no end to the difficulties and embarrassments of neutral prize tribunals. They would be compelled to decide in every variety of shape upon marine trespasses *in rem* and *in personam* between belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of foreign witnesses, and thus they would draw within their jurisdiction almost every incident of prize. Such a course of things would necessarily create irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties. Considerations of public policy, therefore, come in aid of what we consider the law of nations in this subject, and we may add that Congress in this legislation has never passed the limit which is here marked out."

The case of the "Santissima Trinidad"[3] has been already referred to on other points. Two grounds were relied on for restitution: first, that the capturing vessels, the "Independencia" and "Altravida," were originally equipped, armed, and manned as vessels of war in the ports of the United States; secondly, that there was an illegal augmentation of the force of the "Independencia" within those ports. We have already seen that,

[1] 4 Curtis, 406 (1819).
[2] H. Curtis, 673 (1820).
[3] 7 Wheat., 284. See *ante*, pp. 409, 421.

since the municipal laws of the United States did not prohibit a *bona fide* trade in vessels or munitions of war to a belligerent, these articles were merely subject by the law of nations to the penalty of confiscation as contraband if captured.

After the sale, however, the "Independencia" returned to Baltimore, where she was received as a public ship, and underwent considerable repairs. Her bottom was new coppered, some parts of her hull were recaulked, part of the water-ways were replaced, a new head was put on, some new sails and rigging to a small amount and a new mainyard was obtained, some bolts were driven into the hull, and the mainmast, which had been shivered by lightning, was taken out, reduced in length, and replaced in its former position. In order to make these repairs, her guns, ammunition, and cargo were discharged under the inspection of an officer of the customs, and when the repairs were made the armament was replaced, and a report made by a proper officer to the collector that there was no addition to her armament.

She thus sailed with a crew of 112 men, about thirty of whom were enlisted at Baltimore, accompanied by the "Altravida" as a tender.

This enlistment, said Mr. Justice Story, was a clear augmentation of force within the territory of the United States, by a substantial increase in the crew of the "Independencia," which rendered it unnecessary to determine whether there had not also been an illegal increase of her armament. Some of the general repairs, said the learned judge, could hardly be deemed of great necessity, and must have been induced by the consideration that Baltimore was a port peculiarly fitted for naval equipment.

The circumstances surrounding the "Altravida" were very similar. Part of her armament was mounted, and a crew of about twenty-five men were put on board at Baltimore. It was held here that there was both illegal augmentation of force in the enlistment of the crew and the unlawful equipment of the vessel.

A further point to be noticed in this case is that an augmentation of force or illegal outfit only affects captures made during the same cruise for which such augmentation or outfit was made.

"It has never been held," said Mr. Justice Story, "that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated.

"By analogy to other cases of violation of public law, the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this Court has long established that such illegal augmentation is a violation of the law of nations, and as a violation of our

neutrality by analogy to other cases, it infects the captures subsequently made with the character of tests, and justifies and requires a restitution to the parties who have been injured by such misconduct."

In the case of the "Grand Para,"[1] the distinction between the sale of an armed vessel to a belligerent, and the fitting out, arming, and manning a vessel *with intent* to cruise in the service of a belligerent, was clearly drawn by Marshall C.J. the following day:

"That the 'Irresistible' (the capturing ship) was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, *for the purpose of being employed as a cruiser* against a nation with whom the United States were at peace, was," said the learned judge, "too clear for controversy. That the arms and ammunition were cleared out as cargo cannot vary the case. Nor is it thought to be material that the men were enlisted in form as for a commercial voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted for the purposes of war. The crew were too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate *the intent* with which the 'Irresistible' sailed out of the port of Baltimore."

It was accordingly held that the "Irresistible" came within the section of the Act of 1818, which made it penal for any person within the jurisdiction of the United States to be

"knowingly concerned in the furnishing, fitting out, or arming of any ship or vessel *with intent* that such ship or vessel shall be employed in the service of any foreign prince or State *to cruise*."

It was also held that a *bona fide* termination of the cruise for which the illegal armament was obtained put an end to the disability growing out of the violation of the municipal law, which did not attach indefinitely. If, however, the termination was only colourable, the disability still continued.

The "Nereyda"[2] was a Spanish man-of-war which had been captured in 1818 by the privateer "Irresistible," of which John Daniels was the commander and Henry Childs lieutenant, and which had been illegally equipped at Baltimore. The "Nereyda" was carried to the island of Margarita under Childs as prize-master. It was alleged that she was here condemned and sold. Childs obtained a commission from the Venezuelan Government and returned with her to Baltimore. Upon a claim by the Spanish consul, Childs failed to produce any evidence of the alleged decree of condemnation or of the sale, and the vessel was ordered to be restored.

[1] 7 Wheat., 471 (1822).
[2] 8 Wheat., 108 (1823).

An objection was taken in the case of the "Palmyra,"[1] that in order to maintain a libel *in rem*, there must have been a due conviction upon a prosecution and indictment for the offence *in personam*.

"This doctrine," said Story J., "never was applied to seizures and forfeitures created by statute *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem* on seizures in the Admiralty. Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceedings *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America the jurisdiction over proceedings *in rem* is usually vested in different courts from those exercising criminal jurisdiction. . . . In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature."

In the United States *v.* "Quincey,"[2] the indictment under section 3 of the Act of 1818 charged the defendant with being knowingly concerned in the fitting out, in the port of Baltimore, of the "Bolivar" with intent to employ her in the service of a foreign "people," the United Provinces of Buenos Ayres, against the subjects of the Emperor of Brazil, with whom the United States were at peace.

At Baltimore the vessel was fitted with sails and masts larger than those required for a merchant vessel, and was altered in a manner to suit her carrying passengers and with a port for a gun. She also had on board one gun-carriage and slide, a box of muskets, and thirteen kegs of gunpowder.

The vessel then sailed to St. Thomas, where she was fully armed, and afterwards cruised under the Buenos Ayres flag. It was held that to bring the defendant within the section it was not necessary to charge him with being concerned in fitting out *and* arming the vessel; the words being "fitting out *or* arming." Either would constitute the offence. It was sufficient if the indictment charged the offence in the words of the section. It is true that the chief actors should be charged with fitting out *and* arming. The section may require that both acts shall concur, and

[1] 12 Wheat., 1 (1827).
[2] 6 Peters, 445 (1832).

the vessel be put in a condition to commit hostilities in order to bring her within the law; but an *attempt* to fit out *or* arm is made an offence.

"This is certainly doing something," said Mr. Justice Thompson, "short of a complete fitting out and arming. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress towards it. Any support or endeavour to effect it will satisfy the terms of the law."

It was not necessary, in the opinion of the Court, that the "Bolivar," when she left Baltimore, should be armed, or in a condition to commit hostilities, in order to find the defendant guilty of the offence.

"The offence," declared Mr. Justice Johnson, "consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging exclusively to the jury to decide. It is a material point on which the legality or criminality of the act must turn, and decides whether the adventure is of a commercial or warlike character. The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilities against foreign Powers at peace with the United States.

"The collectors are not authorized to detain vessels, although manifestly built for warlike purposes and about to depart from the United States, *unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign Power at peace with the United States.*

"All the latitude, therefore, necessary for commercial purposes is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war."

In the case of the "Meteor,"[1] this vessel was built in the United States in 1865 during the war between Chile and Spain, and sold to the Chilian Government without armament, and then, it was alleged, commissioned within the United States as a Chilian privateer. The following reasons for liberating the ship were given by Mr. Justice Nelson:—

"(1) Although negotiations were commenced and carried on between the owners of the 'Meteor' and agents of the Government of Chile for the sale of her to the latter with the knowledge that she would be employed against the Government of Spain, with which Chile was at

[1] 17 Fed. Cas. 178; 26 Fed. Cas. 1241; Scott's "Cases on Inter. Law," p. 711 (1866).

war, yet these negotiations failed, and came to an end from the inability of the agents to raise the amount of the purchase money; and if the sale of the vessel in its then condition and equipment to the Chilian Government would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

"(2) The furnishing of the vessel with coal and provisions for a voyage to Panama or some other port of South America, and the purpose of the owners to send her thither, in our judgment was not in pursuance of an agreement or understanding with the agents of the Chilian Government, but for the purpose and design of finding a market for her, and that the owners were free to sell her on her arrival there to the Government of Chile or of Spain, or of any other Government or person with whom they might be able to negotiate a sale.

"(3) The witnesses chiefly relied on to implicate the owners in the negotiations with the agents of the Chilian Government with a view and intent of fitting out and equipping the vessels to be employed in the war with Spain are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in the expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations, and whose testimony is to be examined with considerable distrust and suspicion."

The "Florida"[1] was charged with the violation of section 3 of the Act of 1818, in that she was fitted out to commit hostilities against the Government of Spain. It was alleged that the vessel with her cargo, consisting of arms and munitions of war, was really owned by Cuban insurgents; that she was to proceed to Vera Cruz, and to be there transferred to agents of the insurgents, and thence to carry the cargo to some point off the coast of Cuba and land it by means of rafts made out of lumber on board, and towed by a steam launch also on board.

In holding that such facts, even if proved, did not establish a violation of the third section, Mr. Justice Blatchford found that there was no satisfactory evidence that the vessel was furnished or fitted out or armed, or attempted to be furnished or fitted out or armed, with intent that she should be employed to cruise or commit hostilities in the service of the Cuban insurgents against the Government of Spain. There was no evidence that she was intended to do anything more than transport her cargo to the coast of Cuba and to land it there as described. The landing of a cargo of contraband on the shore of one belligerent, at a point not blockaded, is not an act of hostility against the other belligerent within the statute.

An attempt was made to show that the doctrine had been confined to cases of captures made by privateers, and that it had

[1] 4 Ben., 452 (1871).

never been applied to captures by public ships. The Court refused to admit any such distinction.

"In cases of violation of neutral territorial jurisdiction," said Mr. Justice Story, "no distinction has ever been made between the capture of public and private armed ships."

"As to the restitution of prizes made in violation of neutrality," said Mr. Justice Johnson, in "L'Invincible,"[1] "there could be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial in whom the property of the offending vessel is vested; the commission under which the captor acts is the same, and that alone communicates the right of capture even to a vessel which is national property."

Finally, the grounds for the exemption of foreign public ships from local jurisdiction were examined, and it was shown that no absolute right to such exemption existed, but that it stood upon principles of public comity and convenience, and arose from the presumed consent or licence of nations, such consent or licence being liable to be withdrawn at any time upon notice.

"It may therefore," said Mr. Justice Story, "be justly laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange if a licence implied by law from the general practice of nations, for the purposes of peace, should be construed as a licence to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and if a proper case be made out for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports by the express permission of our own Government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws."[2]

These decisions prove decisively, said Sir William Harcourt, that the American statute

"was not intended to, and did not in fact, operate so as in any way to

[1] 1 Wheat., 238 (1816).
[2] The "Santissima Trinidad," 7 Wheat., at p. 354.

limit or control the absolute freedom of commerce. The Enlistment Act is directed not against the *animus vendendi*, but the *animus belligerendi*. It prohibits warlike enterprises, but it does not interfere with commercial adventure. A subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent with impunity; nay, he may even despatch it for sale to the belligerent port. But he may not take part in the overt act of making war upon a people with whom his sovereign is at peace. The purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against his own sovereign, not to prevent transactions in contraband with the belligerent. Its object is to prohibit private war, and not to restrain private commerce."[1]

A few years later Mr. James Speed, the Attorney-General, in his opinion for Mr. Seward, Secretary of State, said:—

"I know of no law or regulation which forbids any person or Government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser."[2]

Throughout these cases the intent of the parties concerned in the fitting out, arming, and equipping was the determining element in the decisions—the *animus vendendi* being innocent, the *animus belligerendi* guilty.

"As to the preparing of vessels within our jurisdiction," wrote Dana in 1866, "for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, towards such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations or the extent to which they may have gone, and though his attempt may have resulted in no definite progress towards the completion of the preparations. The procuring of the materials to be used, knowingly and with intent, etc., is an offence. Accordingly it is not necessary to show that the vessel was armed, or was in any way or at any time, before or after the act charged, in a condition to commit acts of hostility.

"On the point of intent more nicety and discrimination are necessary. If the person charged has himself the control of the vessel, to put her into foreign belligerent service, the question of the intent to employ her is simple. If he has not, he is still chargeable with doing acts or being knowingly concerned in the doing of acts of or towards the preparation with the intent that the vessel shall be so employed, though others may control her during the preparations. But the intent must be that she shall be so employed; and the intent must be a fixed and present intent, and not a wish or desire merely that she may be. If there is a contingency it must, to exculpate the party, be one which forms a condition precedent to the intent, and not merely a condition precedent to the employment or

[1] "Historicus," 168. See Abdy's "Kent," 291, 321; Gibbs' "Foreign Enlistment Act."
[2] 11 Op. Att.-Gen. U.S. 452 (1865).

a condition subsequent which may defeat the intent. Thus if the owner sends a vessel not completely ready for hostilities, with instructions to her commander to complete her preparation and obtain letters of marque in the port of her destination, and in case of failure in obtaining the commission and equipment to take a cargo and return, he would doubtless be guilty; for he entered on the execution of his purpose, and those are the ordinary contingencies of all employments by which they may be defeated. But the purpose to which he shall put his vessel after her arrival may depend on circumstances so contingent and fortuitous, as to relieve him from the charge of a fixed intent at the time he sent her out.

"It will be seen at once by these abstract definitions that our rules do not interfere with *bona fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel and supply her with stores and offer her for sale in our own market. If he does any acts as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel so equipped under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search and seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicion and abuse, and the line may often be scarcely traceable, yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise immediately or ultimately against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case the ship is merchandise, under *bona fide* neutral flag and papers, with a port of destination, subject to search and capture as contraband merchandise by the other belligerent, to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation if she does any act of hostility to the property of a belligerent as much as if she did it to that of a neutral. Such a trade in contraband a belligerent may cut off by cruising the seas and blockading his enemy's ports. But to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral, and to do that effectually he must maintain a kind of blockade of the neutral coast which, as neutrals will not permit, they ought not to give occasion for.

"No cases have arisen as to the combination of materials which, separated, cannot do acts of hostility, but united constitute a hostile instrumentality, for the intent covers all cases and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise."[1]

[1] Dana's "Wheaton," note 215.

Professor T. J. Lawrence, however, doubts whether the principle of intent alone furnishes a sufficiently workable rule in the complications which arise.

A line which may often be "scarcely traceable" is not a very practicable division between the forbidden and the permissible. He points how in the United States *v.* Quincy the Court carefully distinguished between a fixed and present intent and a contingent or conditional intent to go to the West Indies and endeavour to procure funds for a belligerent cruise. The latter was a contingent intent, and therefore innocent, whereas an intent to go on a belligerent cruise that was liable to be defeated by failure to obtain the necessary funds in the West Indies was a fixed and present intent, and therefore guilty.[1]

For the analogous offence of fitting out vessels within the jurisdiction of the United States with intent to employ such vessels in the transport of slaves contrary to the Slave Trade Acts of 1794,[2] 1800,[3] 1803,[4] 1807,[5] and 1818,[6] the following cases should be consulted: The "Mary Ann," 8 Wheat. 380; the "Merino," 9 Wheat. 391; the "Emily and Caroline," 9 Wheat. 381; the "Margaret," 9 Wheat. 421; the "Antelope," 10 Wheat. 66; the "Plattsburg," 10 Wheat. 133; the "Josefa Segunda," 10 Wheat. 312; the "Alexander," 3 Mason, 175; the United States *v.* Gooding, 12 Wheat. 460.

In 1837 the Canadian rebellion broke out, but the belligerency of the rebels was never recognized by the Government. Nevertheless the existing laws, as President Van Buren pointed out in his special message to Congress, 5 January, 1838, were insufficient to guard against hostile expeditions from the United States against friendly Powers on the northern and southern boundaries. The laws were, he admitted, sufficient for the punishment of such offences after they had been committed, and provided the parties could be found; but the Executive was powerless in many cases to prevent their commission, even when in possession of ample evidence of an intention on the part of evil-disposed persons to violate the laws of the Union.[7]

As a result of this message, the Neutrality Act of 10 March, 1838, was passed, which was declared to be supplementary to the Act of 1818.[8] By section 1, the authorities were authorized

[1] "Principles of Inter. Law," 548.
[2] Ch. X. Statutes at Large, Vol. I, 347.
[3] Ch. LI. *ibid.*, Vol. II, 70.
[4] Ch. X. *ibid.*, Vol. II, 205.
[5] Ch. XXII. *ibid.*, Vol. II, 426.
[6] Ch. XCI. *ibid.*, Vol. III, 450.
[7] "Statesman's Manual," Vol. II, 1199.
[8] Statutes at Large, U.S.A., Vol. V, 212.

to seize and detain any vessel or any arms or munitions of war which might be provided or prepared for any military expedition or enterprise against the territory or dominion of any foreign prince or State, or of any colony, district, or people conterminous with the United States, and with whom they were at peace, contrary to section 6 of the Act of 1818, and to retain possession until the decision of the President, or until otherwise released. Section 2 provided for the seizure of any vessel or vehicle, arms or munitions about to pass the frontier where there was probable cause to believe that they were intended to be employed in carrying on a military expedition. Mode of seizure and procedure are provided for by sections 3, 4, 5, 6, and 7, whilst section 8 provides—

"That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States or of the militia as shall be necessary to prevent the violation, and to enforce the due execution of this Act and the Act hereby amended."

By section 9, the Act was limited to two years.

Notwithstanding the President's message and a strong military force sent to the frontier, an expedition, openly organized at Detroit, seized the arsenal and steamboats and ships lying off the wharves, and succeeded in getting off to Canada. The Bill for the prevention of such expeditions introduced into Congress was, as we have seen, not passed till 10 March, by which time the rebellion had been nearly subdued.

The next occasion when the Foreign Enlistment Act was called into requisition was in 1848, when the Government prohibited a ship of war, purchased for the German fleet during the war with Denmark, from leaving New York without entering into the bond required by the Act of 1818.

In 1850 took place the expedition under Lopez for the invasion of Cuba. The first attempt was a failure, and on his return Lopez was arrested, but—

"No delay being granted by the district judge to procure evidence, he was discharged amid the cheers of a large crowd."[1]

Charged a second time, a true bill was found against Lopez and fifteen others, but the Government failed to make out a case and finally abandoned the prosecution.

Encouraged probably by these failures of the law, Lopez organized another expedition, which left New Orleans on 3 August, 1851, with 400 armed men on board the "Pampero."

[1] "Chronicle," 23 Sept., 1851.

The expedition landed in Cuba and proved an entire failure. Fifty of the invaders were shot, and Lopez was publicly executed at Havana.

In 1855 the "Maury" was detained at New York. The evidence, however, failed, although there was little doubt that she was intended to serve as a Russian privateer in the China seas.

During the years 1857–59, filibustering expeditions were organized by one Walker against Nicaragua. In spite of the efforts of the Government, Walker managed to evade their vigilance. His career was eventually closed by his execution at Truxillo in September, 1860.

In 1866 took place the "Fenian Raids" into Canada. The President issued a Proclamation of Neutrality, and some prosecutions followed which, however, proved abortive. Eight or nine hundred men had crossed into Canada, and being defeated by a force of volunteers recrossed the frontier, and were arrested by the United States forces on their return.

In 1870 two more expeditions of a similar character met with a similar fate, the men being disarmed on their return by the United States troops. Some of the leaders were fined and imprisoned, but were released after two or three months' incarceration.

Great Britain.—Numerous statutes had been passed prohibiting British subjects from enlisting or engaging to enlist or serve in foreign service, military or naval, without the licence of the Crown,[1] when the Foreign Enlistment Act of 1819[2] was enacted to more effectually achieve this object and also to prevent the fitting out, equipping, and arming vessels intended for warlike operations against any foreign State or Government with which Great Britain was at peace.

This statute was avowedly based upon the Act of Congress of 1794, and the object of the English legislature was to follow as closely as possible the course of American legislation.

On the motion of Lord Althorp, on 16 April, 1823, for leave to bring in a Bill to repeal the Act of 1819, Mr. Canning said:—

"If I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the Presidency of Washington and the secretaryship of Jefferson. In 1793, complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel, fitting

[1] 9 Geo. II. c. XXX; 29 Geo. II. c. XVII; 11 Geo. II. (Ir.); 19 Geo. II. (Ir.).
[2] 59 Geo. III. c. LXIX.

out, was seized, delivered over to the tribunals, and condemned. Upon that occasion the Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain. Here, sir, I contend is the principle of neutrality upon which we ought to act. *It was upon this principle* that the Bill in question was enacted."[1]

The circumstances under which the Act of George III was passed are described as follows:—

"Ever since the contest between the splendid colonies of Spain and the mother-country had begun in 1810, it had been regarded with warm interest in Great Britain; partly in consequence of the strong and instinctive attachment of its inhabitants to the cause of freedom, and sympathy with all who are engaged in asserting it; partly in consequence of extravagant expectations formed and fomented by interested parties, as to the vast field that, by the independence of those colonies, would be opened to British commerce and enterprise. . . .

"Not only did great numbers of the peninsular veterans, officers, and men go over in small bodies and carry to the insurgents the benefit of their experience and the prestige of their fame, but a British adventurer, who assumed the title of Sir M'Gregor M'Gregor, collected a considerable expedition in the harbours of this country, with which, in British vessels and under the British flag, he took possession of Porto Bello in South America, then in the undisturbed possession of a Spanish force, a country at peace with Great Britain. This violent aggression led to a strong remonstrance on the part of the Spanish Government, in consequence of which the Government brought in a Foreign Enlistment Act, which led to violent debates in both Houses of Parliament."[2]

In introducing the Bill, Sir S. Shepherd, Attorney-General, said:—

"It was extremely important for the preservation of neutrality that the subjects of this country should be prevented from fitting out any equipments not only in the ports of Great Britain and Ireland, but also in the other ports of the British Dominions, to be employed in foreign service. The principle in this case was the same as in the other, because by fitting out armed vessels, or by supplying the vessels of other countries with warlike stores, as effectual assistance might be rendered to a foreign power as by enlistment in their service. In this second provision of the Bill two objects were intended to be embraced: to prevent the fitting out of armed vessels, and also to prevent the fitting out or supplying other ships with warlike stores in any of His Majesty's ports. Not that such vessels might not receive provisions in any port in the British Dominions; but the object of the enactment was to prevent them from shipping warlike stores, such as guns and other things obviously and manifestly intended for no other purpose than war."[3]

[1] Canning's Speeches, Vol. V, 50; see also Vol. IV, 150.
[2] Alison's "History of Europe," Vol. I, c. IV, sec. 95.
[3] Hansard, Vol. XL, 364 (1819).

The sections of the Act dealing with the fitting out and equipment of vessels are obviously drafted from the corresponding clauses in the American statutes. For this reason and also because they have been discussed in several important cases, no apology is made for reproducing them here.

By section 7 it is enacted,—

"That if any person, within any part of the United Kingdom or in any part of His Majesty's Dominions beyond the seas, shall, without the leave or licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, State, or potentate, or of any foreign colony, province, or a part of any province or people or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign State, colony, province, or part of any province or people as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, State, or potentate, or against the subjects or citizens of any prince, State, or potentate or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country with whom His Majesty shall not then be at war; or shall within the United Kingdom or any of His Majesty's Dominions or in any settlement, colony, territory, island, or place belonging or subject to His Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid; every such person so offending shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted; and every such ship and vessel, with the tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of His Majesty's Customs or Excise, or any officer of His Majesty's navy who is by law empowered to make seizures for any forfeiture incurred under any of the laws of Customs or Excise or the laws of trade and navigation, to seize such ships and vessels aforesaid and in such places and in such manner in which the officers of His Majesty's Customs or Excise and the officers of His Majesty's navy are empowered respectively to make seizures under the laws of Customs and Excise or under the laws of trade and navigation; and that every such ship and vessel with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner, and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the Revenue of Customs and Excise, or of the laws of trade and navigation."

By section 8, which deals with augmentation, it is enacted,—

"That if any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of His Majesty's Dominions beyond

the seas, without the leave or licence of His Majesty for that purpose first had and obtained as aforesaid, shall by adding to the number of the guns of such vessel, or by changing those on board for other guns or by the addition of any equipment for war, increase or augment or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war or cruiser or other armed vessel, which at the time of her arrival in any part of the United Kingdom or any of His Majesty's Dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign prince, State, or potentate or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such prince, State, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any person or persons so exercising or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanour, or shall upon being convicted thereof upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted."

By section 9, these offences, if committed out of the United Kingdom, might be prosecuted and tried in the King's Bench at Westminster.

The statute was discussed at great length in the celebrated case of the "Alexandra," reported under the name of Attorney-General *v.* Sillem.[1] The vessel was built at Liverpool for some Liverpool merchants, who were agents for the Confederate States of America. It was clearly established by the evidence for the Crown that the vessel had been constructed for warlike purposes, and that at the time of her seizure workmen were engaged attaching warlike fittings. According to the evidence of Captain Inglefield, R.N., she certainly was not intended for mercantile purposes, and although she might be used as a yacht, was easily convertible into a man-of-war.

On 6 April, 1863, the "Alexandra" was seized by an officer of the Customs in the Toxteth Dock, Liverpool, and an information laid charging the defendants and others with a violation of the statute. The defendants claimed the vessel, and pleaded that it was not forfeited.

Every possible violation of the Act by fitting out, equipping, and furnishing, and the attempt, but not that of arming, was included in the information.

The cause came on before Pollock C.B., on 22 June, who declared—

"That the Foreign Enlistment Act did not prohibit the building of ships for a belligerent Power; that the sale by any person in this kingdom to a belligerent Power of any quantity of arms, ammunition, or destructive

[1] 2 H.L.C., 431–641 (1863).

material, was not forbidden by international or municipal law; and if so, why should ships be an exception? which, in his opinion, they were not. That if it was lawful for a person to build a ship easily convertible into a man-of-war, and offer it for sale to either of the belligerents, it was lawful for the Confederate States to employ a builder to build a ship of the same description and send it to them. That the object of the statute was not the protection of belligerents, otherwise the Legislature would have prohibited the sale of gunpowder; but to prevent the equipment for war, in the ports of this country, of vessels which might possibly come into hostile communication before they passed the neutral line."

The following question was left to the jury:—

"Was there any intention that in the port of Liverpool, or any other port, she should be either equipped, furnished, fitted out, or armed with the intention of taking part in any contest? If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order and in compliance with a contract, leaving it to those who bought it to make what use they thought fit, then it appears to me that the Foreign Enlistment Act has not been in any degree broken."

The jury found a verdict for the defendants. The Chief Baron's direction to the jury was upheld by the Exchequer Chamber.

Barton *v.* Pinkerton[1] was an action brought by a mariner for the breach of a contract under which he was engaged to serve the defendant for twelve months on board the "Thames." This vessel was in the service of the Peruvian Government with a cargo of coals and ammunition, and in the course of her voyage to Rio she met and supplied with these stores two Peruvian ships of war. Before leaving Rio for another Peruvian port, war broke out between Spain and Peru. The plaintiff objected to serve any further, and accordingly left the ship.

It was held that the plaintiff was entitled to recover damages for the breach of contract, inasmuch as the continuance of the voyage would have exposed him to greater danger than he had bargained for.

"By the seventh section," said Kelly C.B., "it is made an offence to fit out a ship to be used in aid of a belligerent as a store-ship, but the offence must be committed within the British dominions. This ship was so fitted out in London, but before the declaration of war, and therefore the offence was incomplete. But it was actually used as a store-ship after the declaration of war, and continued to be so used, under the order of Borras (a Peruvian agent), after the plaintiff had quitted the ship and the ship had quitted Rio. If then it were necessary to decide the question, I should hold that to serve on board a vessel used as a store-ship in aid of a belligerent,

[1] 2 Ex. 340 (1867). See Sibery *v.* Connelly, 22 T.L.R., 174 (1905); Sivewright *v.* Allen, *ibid.*, 482 (1906); [1906] 2 K.B., 51; Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K.B., 315.

the fitting out of which to be so used is an offence within the seventh section, is 'a serving on board a vessel for a warlike purpose in aid of a foreign State' within the second section. But if this were doubtful, I am of opinion that so to employ this vessel was a breach of that which I held to be the contract with the plaintiff, to employ him with the rest of the crew for a specified period on board this vessel upon an ordinary commercial voyage. It is impossible not to see that by adventures like these this country has been brought to the very verge of war—first with the United States, and latterly with Spain; and I think we ought not to permit a doubt to be entertained, whether to engage and employ the crew of a British ship in such an adventure is within the terms of a lawful contract like that which has been entered into between the defendant and the plaintiff."

The status of insurgents in relation to the seventh section of the Act was raised and decided in the case of the "Salvador."[1] This was a British vessel employed as a transport or store-ship in the service of the Cuban insurgents, who, though not recognized as belligerents, had formed themselves into a body of people, forming part of the province or people of Cuba, to act together and undertake and conduct hostilities.

In delivering the judgment of the Judicial Committee of the Privy Council, and in condemning the ship, Lord Cairns set out the five propositions to be established in bringing a case within the seventh section of the Act. First, the ship must be found acting without the leave and licence of the Crown; secondly, the ship must be equipped, furnished, fitted out, or armed, or there must be a procuring, etc.: thirdly, the equipping, etc., must be done with intent, or in order that the ship shall be employed in the service of some

"foreign prince, State, or potentate, or some foreign colony, province, or part of any province or people or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign State, colony, province, or part of any province or people."

Fourthly, there must be intent to employ the ship in one of two capacities, either

"as a transport, or store-ship, against any prince, State, or potentate, or with intent to cruise or commit hostilities against any prince, State, or potentate, etc."

Fifthly, such prince, etc., must be one with whom this country should not then be at war.

It was upon the third proposition alone that the Court below had felt any doubt.

"It is to be observed," said Lord Cairns, "that this part of the section is in the alternative. The ship may be employed in the service of a

[1] L.R., 3 P.C. 218 (1870).

foreign prince, State, or potentate, or foreign State, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign State, whether it be the potentate who has the absolute dominion, or the government or a part of the province or of the people or the whole of the province or the people acting for themselves, that is sufficient.

"But by way of alternative, it is suggested that there may be a case where, although you cannot say that the province or the people or a part of the province or people are employing the ship, there yet may be some person or persons, who may be exercising or assuming to exercise powers of government in the foreign colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and therefore, by way of alternative, it is stated to be sufficient if you find the ship prepared or acting in the service of 'any person or persons exercising or assuming to exercise any powers of government in or over any foreign State, colony, province or part of any province or people,' but that alternative need not be resorted to if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any foreign State or people or part of any province or people.'"

Upon that the observation of the learned judge was this:—

"We have no evidence of the object of the insurrection, who are the leaders, what portion of Cuba they have possession of, in what manner this insurrection is controlled or supported, or in what manner they govern themselves. How, therefore, can I say that they are assuming the powers of government in or over any part of the Island of Cuba?

"Now it appears to their lordships that the error into which the learned judge below fell was in confining his attention to what I have termed the second alternative of this part of the section, and in disregarding the first part of the alternative. It may be (it is not necessary to decide whether it is so or not) that you could not state who were the person or persons exercising or assuming to exercise power of government in Cuba in opposition to the Spanish authorities. That may be so: their lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within the second alternative of the section; but their lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the section, because their lordships find these propositions established beyond all doubt: there was an insurrection in the Island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; those insurgents beyond all doubt formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connexion with and in the service of this body of insurgents."

During the War of Secession in the United States, numerous complaints had been addressed to the British Government of its failure to perform its neutral duty by the prevention of the *building* and *selling* in its ports of vessels intended to be employed in the service of the Confederate States against the United States with whom Great Britain was at peace.

No doubt a large proportion of the British public sympathized with the Secessionists, and where this sentiment was combined with good business, sympathy was only too naturally translated into action.

But the wholesale accusations of "a consistent course of partiality towards the insurgents," and "a want of diligence bordering on wilful negligence" against the British Government are scarcely warranted. The complaint that Great Britain had become "the navy yard of the insurgents" was an exaggeration. Blockade-runners innumerable were built and supplied, but there was nothing illegal in this.

Four vessels only—the "Florida," the "Alabama," the "Georgia," and the "Shenandoah," built and equipped in British waters—found their way into the hands of the Confederates. The two latter vessels were not ships of war, and after the escape of the two former, no vessel of war to which the notice of the authorities was directed, and which was proved to be intended for war, was allowed to depart.

The first intimation of any attempt on the part of the Confederate States to fit out or procure a vessel of war within the jurisdiction of Great Britain was the complaint lodged by Mr. Adams against the "Bermuda," on 16 August, 1861, which turned out to be a blockade-runner.

The next were those against the "Florida," 19 February, and the "Alabama," 23 June, 1862. The "Alexandra" was seized 5 April, 1863, and the proceedings instituted against her failed, as already related. She was seized again at Nassau, and again liberated; the cost and damages incurred by the Government amounting to over £4000.

On 9 October, 1863, two ironclads at Liverpool, which had clearly been bought for the Confederate States, were seized, and ultimately purchased by the Government, to prevent them passing into their hands. The "Canton," built at Glasgow, also for the Confederates, was seized on 10 December and detained. A number of other vessels were also placed under surveillance.

To sum up, during the whole war two ships of war only were built in Great Britain for and employed in the service of the Confederates. Four others were intended to be built and equipped, but were arrested whilst in course of construction. Four merchant vessels, though not adapted for warlike purposes, were converted into vessels of war by having guns put on board outside the jurisdiction of Great Britain—two of them in Confederate ports.

The "Florida."—On 19 February, 1862, a complaint was lodged against the "Florida." There was in this communication

from the American consul no evidence whatever of the intended employment or true ownership of the vessel, and no circumstance stated which, if verified, could have produced more than a mere suspicion.

An inquiry was, however, instantly directed by the British Government, but no information could be obtained tending to connect the vessel in any way with the Confederate States. She was declared by the builder to be ordered for a firm at Palermo, and it was not until two days after she had sailed that the British Government ascertained that its alleged construction for the Italian Government was fraudulent. On clearing from Liverpool for Palermo and Jamaica, 23 March, 1862, she had no troops, arms, or military supplies on board. Her destination was false, and on arrival at Nassau most of her crew insisted on being discharged. After considerable discussion she was seized at the Bahamas on a charge of a violation of the Foreign Enlistment Act. Proceedings were instituted in the Vice-Admiralty Court, but the judge, being of opinion that although she had been fitted out in British territory, yet as she had not armed in the colony nor been transferred to a belligerent, she must be released. She then, after enlisting some men, left for Green Cay, a desert island sixty miles south of Nassau, where she was met by the "Prince Alfred," which had cleared from Hartlepool with her armaments, but which it was unknown in England were intended for the "Florida."

From Green Cay she proceeded to Cardenas, in Cuba, where she endeavoured, without success, to enlist more men, and, eluding the blockading cruisers, entered the Confederate port of Mobile. Here she remained four months, to issue as a Confederate ship of war, in which capacity she was admitted into several British ports, where she was treated as a belligerent public vessel.

The "Alabama."—This vessel, undoubtedly intended for war and constructed and adapted accordingly, was from the first—although this was unknown at the time to the British authorities—expressly built for the Confederate States.

The English Government was warned as early as 23 June, 1862, by Mr. Adams, the American Minister in London, that the vessel was about to depart and enter the service of the Confederate States. A great deal of correspondence then ensued between Mr. Adams and Mr. Dudley, the American Consul at Liverpool, and the Department of Customs, but the solicitor to the latter advised that the evidence was insufficient to bring the vessel within the provisions of the Foreign Enlistment Act, and in this he was supported by the opinion of the Commissioners of Customs.

Eventually affidavits were obtained from some of the men who had been engaged to serve on the vessel, and who were informed by the captain who engaged them that "the vessel was going out to the Government of the Confederate States . . . to fight for the Southern Government."

On 16 July, and again on the 23rd, Mr. Collier, Q.C., was consulted on behalf of the American Government, and his opinion was as follows:—

"I have perused the above affidavits, and I am of opinion that the Collector of Customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her; and that if after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility—a responsibility of which the Board of Customs, under whose directions he appears to be acting, must take their share.

"It appears difficult to make out a stronger case of infringement of the Foreign Enlistment Act, which, if not enforced on this occasion, is little better than a dead letter.

"It well deserves consideration whether if the vessel is allowed to escape, the Federal Government would not have serious grounds of remonstrance."

In spite of this opinion and of the additional evidence, the solicitor to the Customs remained unshaken in his opinion, and that of the law officers of the Crown was then taken by Lord Russell.

Their opinion was given on the 29th, and was as follows:—

"In our opinion the evidence of the witnesses (William Passmore, Edward Roberts, John Taylor, and Henry Redden), coupled with the character and structure of the vessel, makes it reasonably clear that such vessel is intended for warlike use against the citizens of the United States and in the interest of the Confederate States. It is not and cannot be denied that the vessel is constructed and adapted as a vessel of war; being pierced for guns, the sockets for the belts for which, Passmore states, are already laid down, and having a magazine, and shot, and canister racks on the deck, and a certain number of canisters being actually on board. It is also stated in the report of the Commissioners of Customs of 1 July, that Messrs. Laird, the builders, do not deny that the vessel has been built for some 'foreign Government,' although they maintain apparently a strict reserve as to her actual destination and as to the 'foreign Government' in particular for whose service she is intended. We do not overlook the facts that neither guns nor ammunition have as yet been shipped; that the cargo (though of the nature of naval stores in connexion with war steamers) may yet be classed as a mercantile cargo; and that the crew do not appear to have been, in terms and form at least, recruited or enrolled as a military crew. It is to be expected that great stress will be laid upon these circumstances by their owners and others who may oppose the condemnation of the vessel if seized by the officers of the Customs; and an argument may be raised as to the proper

construction of the words which occur in the seventh section of the Foreign Enlistment Act, 'equip, furnish, fit out or arm,' which words, it may be suggested, point only to the rendering a vessel, whatever may be the character of its structure, presently fit to engage in hostilities. We think, however, that such a narrow construction ought not to be adopted, and if allowed would fritter away the Act, and give impunity to open and flagrant violations of its provisions. We therefore recommend that without loss of time the vessel be seized by the proper authorities, after which an opportunity will be afforded to those interested previous to condemnation to alter the facts if it may be, and to show an innocent destination of the ship. In the absence of any such countervailing case, it appears to us that the vessel, cargo, and stores may be properly condemned."

This opinion, however, arrived too late. Before the necessary orders for seizure could be issued, a wire from Liverpool announced that the "Alabama" had gone out of dock on the evening of the 28th and sailed on the morning of the 29th. She left under the pretence of a trial trip.

The charge of delay against the law officers may be shortly dismissed. The case was submitted in the first place, as was usual, to Sir John Harding, the Queen's Advocate, and owing to his illness—an illness affecting his mental faculties—did not reach the Attorney-General, Sir W. Atherton, and the Solicitor-General, Sir Roundell Palmer, till the 28th.

On leaving the Mersey the "Alabama" proceeded to Moelfra Bay, in Anglesey, about fifty miles from Liverpool, where she waited for a tug with thirty to forty men on board, who were to form part of her crew, and which had left Liverpool on the 30th. On the morning of the 31st the "Alabama" proceeded on her way to the Azores, where she met two vessels, the "Bahama" and the "Agrippina."

The "Georgia."—The "Georgia" was built on the Clyde, ostensibly for the Chinese Government, and was launched on 10 January, 1863, the ceremony of christening being performed by the daughter of Captain North, an insurgent, and who, in October previously, had been shown by an intercepted letter to be in communication with the secretary of the Confederate navy. A copy of this letter was sent to Earl Russell. It is true that steps were being taken to provide the Chinese Government with vessels of war built in England, and that emissaries of the Confederate States used these as a cover for their transactions. But it would have been quite easy for the British authorities to have ascertained exactly what ships were being constructed for neutral Powers.

It is also true that until the "Georgia" left the Clyde on 1 April for Hong-Kong, no complaint had been lodged by the

representatives of the United States against this particular ship. Upon her departure she was complete and ready for service as a vessel of war. She needed nothing but arms and ammunition.

On 4 April the "Alar" cleared from Newhaven for Alderney and St. Malo with men and armaments, under circumstances which excited the suspicions of the collector, who communicated the intelligence to the Commissioners of Customs. On the 8th, Mr. Adams addressed a note of complaint to Earl Russell, who the same day sent instructions to Major-General Slade, Governor of Guernsey, to take such steps as he might be advised. General Slade immediately despatched a cruiser to Alderney.

The "Alar," however, met the "Georgia" off Brest, and the transfer of men and armaments was completed on the 9th. The "Georgia" made for Bahia, and ultimately reached Simon's Bay, where she received "coals, provisions, and caulking." At Teneriffe she again coaled, and making Cherbourg, was admitted into the Government docks for repairs. Proving unsuccessful as a cruiser she returned to Liverpool, where she was dismantled and sold.

The "Shenandoah."—This vessel, originally known as the "Sea King," was a screw steamer, built at Glasgow in 1863, and intended for the China trade. She was in no sense adapted for warlike purposes, although from the first she carried two 12-pounder cannonades, such as merchant vessels are in the habit of carrying as signal guns.

After her return from a voyage to New Zealand, partly on Governmental business, she was sold in the ordinary way to Mr. Richard Wright, a Liverpool shipowner. Mr. Wright was, however, the father-in-law of Mr. Prioleau, the managing partner of Fraser, Trenholm and Co., the well-known agents of the Confederate States in Liverpool.

On 7 October, 1864, Wright granted to Corbett, the master of the ship, a certificate of sale, empowering him to sell the vessel within six months from the date thereof, at any port outside the United Kingdom, for not less than £45,000.

The "Sea King" left London on 9 October, and arrived at Madeira on the 18th, where she met a small vessel, the "Laurel," which had cleared from Liverpool about the same time, with guns, arms, and ammunition. Both vessels then proceeded to the adjoining islands, the Desertas, where the armaments were transferred, and the "Sea King" sold to the Confederate States Government. Of her crew of forty-two, only two or three consented to serve. The Confederate flag having been hoisted, she thenceforth cruised under the name of the "Shenandoah." Nothing further was heard of the "Shenandoah" till her arrival

at Melbourne on 25 January, 1865, when her captain, Waddell, requested permission to repair machinery, take in coal, and land his prisoners. The law officers of the colony having advised that the "Shenandoah" was entitled to be treated as a ship of war duly commissioned, the required permission was granted.

These repairs were, however, interrupted by a controversy between the authorities and Captain Waddell upon an alleged enlistment. The latter, whilst refusing to allow his ship to be searched, solemnly declared that no one had been enlisted, and that he had not in any way violated the neutrality of the port.

Nevertheless, the police took possession of the slip in which the "Shenandoah" was docked, and clearing the yard of all workmen, effectually put a stop to the repairs. The immediate effect of this action was that four men were seen to leave the ship, who when seized declared that they were on board unknown to the captain, and that when discovered he had ordered them ashore. After further declarations from the captain, the repairs were allowed to be continued and the vessel to depart.

As it subsequently transpired, however, Captain Waddell did augment his crew from the colony, in spite of his repeated assurances as an officer and a gentleman. Upon the receipt of this intelligence, the Governor announced his intention of refusing the hospitality of the port to Captain Waddell or any of the officers of the "Shenandoah," and wrote to the Governors of the other colonies and to the Commodore of the station warning them of the breach of neutrality which he had discovered.

The grounds of complaint put forward by the United States Government were summarized by Sir Alexander Cockburn, one of the members of the Tribunal of Arbitration, as follows:—

(1) That by reason of want of due diligence on the part of the British Government, vessels were allowed to be fitted out and equipped in the ports of the United Kingdom, in order to their being employed in making war against the United States, and having been so equipped were allowed to quit such ports for that purpose.

(2) That vessels fitted out and equipped for the before-mentioned purpose in contravention of the Foreign Enlistment Act, and being therefore liable to seizure under that Act, having gone forth from British ports, but having afterwards returned to them, were not seized as they ought to have been, but having been allowed hospitality in such ports, were suffered to go forth again to resume their warfare against the commerce of the United States.

(3) That undue favour was shown in British ports to ships of war of the Confederate States in respect of the time those ships were permitted to remain in such ports, or of the amount of coal with which they were permitted to be supplied.

(4) That vessels of the Confederate States were allowed to make British ports the base of naval operations against the ships and commerce of the United States.

Accordingly, by reason of one or other of these causes, whereby vessels belonging to the Confederate States were enabled, so it was alleged, to inflict injuries upon the commerce of the United States, compensation was claimed in respect of the injuries and their resulting damages so committed.

The claims here made could only be supported by stretching the liability of the neutral State so as to make it responsible for the ultimate effect of two or more independent acts committed within its own jurisdiction, each in itself innocent, but committed with the intent of forming a combination whereby the expedition may assume a warlike character at some spot outside the jurisdiction of the neutral State.

"The intent," argues Dana, "covers all cases and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for those acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise."[1]

It was accordingly argued before the Tribunal of Arbitration at Geneva, on behalf of the United States, that those vessels were in effect "armed within British jurisdiction."

Such a contention, it need scarcely be said, is entirely at variance with the law of nations, and directly in conflict with the decisions of the courts of the United States, as well as of Great Britain.

"The true theory," writes Mr. Hall, "is that the neutral sovereign has only to do with such overt acts as are performed within his own territory, and to them he can only apply the test of their immediate quality. If these are such in themselves as to violate neutrality or to raise a violent presumption of fraud, he steps in to prevent their consequences; but if they are presumably innocent, he is not justified in interfering with them. If a vessel, in other respects perfectly ready for immediate warfare, were to sail with a crew insufficient for fighting purposes, the neutral sovereign may reasonably believe that it is intended secretly to fill up the complement just outside his waters. Any such completion involves a fraudulent use of his territory, and an expectation that it is intended gives him the right of taking precautions against it. But no fraudulent use takes place when a belligerent says: I will not compromise your

[1] Dana's "Wheaton," note 215.

neutrality. I will make a voyage of a hundred miles in a helpless state; I will take my chance of meeting my enemy during that time, and I will organize my expedition when I am so far off that the use of your territory is no longer the condition of its being."[1]

Upon the recognized principles of international law, therefore, whilst a citizen of a neutral State may build and send for sale vessels of war to a belligerent, just as he may send any other contraband articles, it is the duty of a neutral State to prevent a vessel provided with a belligerent commission, or belonging to a belligerent and able to inflict damage on his enemy, from issuing from its ports.

Whatever may be the real merits of the dispute, it is quite clear that the "Alabama" claims were settled by *ex post facto* legislation. By Article VI of the Treaty of Washington, 1871, it was agreed that the arbitrators should be bound by the following three rules:—

"A neutral Government is bound—first, to use *due diligence* to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part within such jurisdiction, to warlike use.

"Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

"Thirdly, to exercise due diligence in its own ports and waters and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

It was expressly declared, however, that the British Government could not assent to the above rules as a statement of the principles of international law in force at the time of the alleged offences, but that in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, it had agreed to the above rules.

This is scarcely the place to discuss the political aspects of this treaty, but since some text-writers have gone out of their way to attack Mr. Gladstone for submitting to the imposition of the rules, it is desirable to state the facts. As early as 1863 popular feeling in England had been rising in favour of the Northern cause, and the desire to remove causes of difference between

[1] Atlay's "Hall," p. 609.

ourselves and the United States had grown at a remarkable speed. Unfortunately, with the growth of this benevolent feeling the American claims became more extravagant. Mr. Sumner, discussing in the Senate the Clarendon Convention of 1869, assessed the claim at four hundred million pounds sterling. In the official demand of 1869, in addition to compensation for the depredations, we were asked to pay for the cost to America of chasing the Confederate cruisers; for the transfer of most of the American commercial marine to the British flag, for enhanced insurance, and generally for the increased difficulty of putting down the rebellion.

The expediency of an accommodation was obvious. There was the possibility of trouble with Russia over the Black Sea, and, as Mr. Childers pointed out, however unprepared the United States might be at the moment, we should undoubtedly have them on our hands sooner or later. But apart from this, Mr. Gladstone was alive to the extent to which England's power in Europe was reduced by the smothered quarrel with America, and his moral nature shrank from a vast and fratricidal struggle.

On 8 May, 1871, the treaty was signed at Washington, but when the American case was put in at the end of the year, Mr. Gladstone experienced a severe shock. It was found to contain a demand for the indirect and consequential remote damages first propounded by Mr. Sumner. A storm at once arose in England, and no one was more incensed than the Prime Minister; and when Mr. Disraeli spoke of them in the House of Commons as preposterous and wild, as nothing less than the exacting of a tribute from a conquered people, Mr. Gladstone declared that such words were in truth rather under the mark than an exaggeration, and went on to say—

"We must be insane to accede to demands which no nation with a spark of honour or spirit left could submit to, even at the point of death."

Upon this question the treaty was nearly wrecked. It was saved by Mr. Adams, the American arbitrator. To have formally abandoned the claim, owing to the temper of the American people, was impossible. He persuaded his colleagues to make a spontaneous declaration that on the principles of international law the indirect claims ought to be excluded from their consideration.

Upon the question of agreeing to the admission of the *ex post facto* "rules" there was a complete and even violent difference of opinion in the Cabinet. We learn from Mr. Morley[1] that eager as Mr. Gladstone was for a settlement, he agreed to the "rules" "with reluctance," although their rejection would have meant the

[1] "Life of Gladstone," Vol. II, p. 403.

loss of the treaty. It was the opinion of Sir Roundell Palmer (afterwards Lord Chancellor Selborne) which decided the Cabinet.

"The risk," argued Palmer, "whether greater or less, before the arbitrators would be caused by translating retrospectively into the form of a hypothetical international convention which did not exist when the events happened, a duty which we had recognized as incumbent upon us under our own laws, and which we had always professed and endeavoured to perform with as much diligence as was reasonably practicable in affairs of domestic government."[1]

These "rules," as understood by both parties, coincided in substance, in Palmer's opinion, with the prohibitions of the Act of 1819, according to the interpretation placed upon it, on which Lord Palmerston's Government had acted during the Civil War. These prohibitions required the exercise of "due diligence" to prevent a violation of neutrality, whenever the Government had reasonable grounds to believe that any such violation was intended. Moreover, the acceptance of the "rules" secured to us for the future a definite and beneficial rule binding by express international engagement upon the United States also.

"Feeling satisfied," he writes to Lord Russell, "that there is nothing in the principle of such an arrangement which ought to be understood as admitting any view different from that which you and I have always maintained, either of the duties of neutrality or of the manner in which our Government fulfilled those duties, I have held in my confidential communications on the subject with the present Government—and should doubtless, if necessary, hold in Parliament—the same language in which I now express myself to you."

And this was the opinion, it must be observed, of the man who was selected to defend the interests of Great Britain before the Tribunal of Arbitration.

The arbitrators (Charles Francis Adams, Count Frederic Sclopis, M. Jacques Staempfli, Viscount d'Itajubá, and Sir Alexander Cockburn) met in the Hôtel de Ville at Geneva on 15 December, 1871, and gave their decision on 15 September, 1872. The conduct of Great Britain with regard to the "Alabama" and its tender, the "Tuscaloosa," was unanimously condemned by the four first-named arbitrators, on the grounds that in view of all the facts relative to the construction of the vessel at Liverpool and its equipment and armament off Terceira through the agency of vessels despatched from Great Britain for that purpose, the British Government had failed to use due diligence in the performance of its neutral obligations, and especially omitted, notwithstanding the warnings and official

[1] Selborne, "Personal and Political Memorials," Vol. I, p. 224.

representations of the diplomatic agents of the United States during the construction, to take in due time any effective measures of prevention, and that the orders which at last were given for the detention of the vessel were issued so late that their execution was impracticable; that after the escape of the vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result; that the vessel was subsequently freely admitted into the colonial ports of Great Britain without any proceedings being taken as they ought to have been, and that the insufficiency of legal means was no justification of the failure in exercising due diligence.

Sir Alexander Cockburn was clearly of opinion that the treaty had created a liability in respect of the equipment of ships which did not previously exist under international law. Equipping a ship for sale to a belligerent in the way of trade was at the time in question no offence against the law of nations, nor a violation of neutrality, though it was an offence against the municipal law of Great Britain. For such equipment the British Government was not responsible, though by the treaty it was bound to use due diligence to prevent the equipment as a matter of neutral obligation and not as a matter of municipal law.

But the diligence to be observed by the State had never yet been defined by international law. In determining the question of negligence, according to the municipal law of most civilized States, the true test to be applied is whether there has been, with reference to the particular subject-matter, that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise in the same circumstances.

Upon this analogy Sir Alexander considered that the principle which prevails with men in their conduct of affairs might well be applied to the discharge of its duties by a government. Applying this standard, one nation has a right to expect from another, in the fulfilment of its international obligations, the amount of diligence which may reasonably be expected from a well-regulated, wise, and conscientious government, according to its institutions and its ordinary mode of conducting its affairs; but it has no right to expect more.

Before the opinion of the law officers had been taken, Sir Alexander held that there was abundant evidence making out a *prima facie* case for the detention of the "Alabama," and that the Collector of Customs, in failing to seize the vessel on 22 July, was guilty of a want of due diligence. Sir Alexander also considered that the authorities showed a want of official activity in not seizing the tug which followed the "Alabama" with her fighting crew. To the argument that whether the armament was

sent from the same port as the ship, or from a different port and by the same or different persons, was immaterial, Sir Alexander replied that the armament, at any rate, was prepared in England,

"and it was part of the same scheme that the vessel, having been 'equipped,' i.e. prepared to receive her armament, in England, should have her armament sent out and put on board out of the Queen's dominions for the purpose of immediate warfare. It is fairly open to contention that under such circumstances the whole should be regarded as one armed hostile expedition issuing from a British port, or at all events that the ulterior purpose of arming, though out of the British jurisdiction, gives to such equipment of the vessel within the jurisdiction the character of an equipment with intent to carry on the war."

Sir Alexander therefore concurred with his colleagues in thinking that the liability of Great Britain in respect of want of due diligence was established by the facts.

Apart altogether from the Rules, it is quite clear that the "Alabama" would have been condemned under the Foreign Enlistment Act, 1819.

Even Lord Russell, after many years of obdurate self-defence, at last confessed in so many words:—

"I assent entirely to the opinion of the Lord Chief Justice that the 'Alabama' ought to have been detained during the four days I was waiting for the opinion of the law officers. But I think that the fault was not that of the Commissioners of Customs; it was my fault as Secretary of State for Foreign Affairs."[1]

With respect to the subsequent conduct of the vessel, Sir Alexander agreed with the opinion of our law officers (Sir R. Palmer, Sir R. Collier, and Sir R. Phillimore) that whatever her previous history, once commissioned, the British authorities were bound to treat her as a ship of war belonging to a belligerent power.

By a majority of four to one the Tribunal found that in the case of the "Florida," the facts relating to its construction in, and departure from, Liverpool ought to have induced the British authorities to resort to adequate measures to prevent the violation of neutrality, and that they failed to use due diligence; that there was negligence on the part of the British colonial authorities at Nassau in allowing the "Florida" to co-operate with the "Prince Alfred" at Green Cay; that the "Florida" was freely admitted into the British colonial ports; that the judicial inquiry at Nassau did not relieve Great Britain of her responsibility as a neutral, and that the stay of the "Florida" at Mobile did not extinguish such original responsibility. Consequently, Great

[1] Walpole's "Russell," II., 373 n.

Britain failed by omission to fulfil the duties prescribed in the three Rules.

The dissentient minority again consisted of Sir Alexander Cockburn. He declared that upon the existing state of facts and upon the then available evidence, the British Government were not guilty of any want of due diligence in allowing the "Florida" to leave Liverpool, nor in failing to procure the evidence necessary to ensure condemnation, since there were no means in their power of obtaining it.

The equipment, in his opinion, was not a violation of neutrality, but merely a breach of the Act of 1819, and there was not sufficient evidence on which to seize the vessel and ask for condemnation under this Act.

At Nassau the "Florida" ought to have been condemned, and but for a mistaken view of the law by the judge, she would have suffered condemnation. But Great Britain was not to be held responsible for this. Sir Alexander dissented from the finding of negligence against the authorities at Nassau in allowing the "Florida" to enlist forty men from that port.

Upon the larger question of the effect of the entry into Mobile, Sir Alexander said that although the original equipment was an offence against the municipal law of Great Britain, it was not, there being at the time she reached the Bahamas no present intention of war, an offence against international law. And so far as the offence against the Act of 1819 was concerned, after the acquittal the matter was *res judicata*. Upon this point Sir Alexander cited the authority of the *United States* v. *Quincey*. The distinction there made was a sound one.

"A present intention does not the less exist because an unexpected event may afterwards change it; but an intention which is to depend on uncertain contingencies cannot be said to be a present one. It is the present intention of the immediate employment of the vessel for hostile purposes which makes the sending out an armed ship an offence against the law of nations, as a violation of neutrality, as distinguished from merely making it contraband of war. Assuredly there must be a distinction between the two things, and I am at a loss to see where the line can otherwise be drawn."

To the contention that Great Britain was entitled and was bound to seize vessels fitted out in violation of her neutrality on entry into her port after the receipt of a commission, Sir Alexander replied that (1) Great Britain had no right, according to international law, to seize such vessels, since they were admitted as commissioned ships of war of a belligerent state; (2) that independently of the foregoing ground, Great Britain could not, as a neutral Government, seize a ship of war of a

belligerent State for that which was not a violation of neutrality, but only of its own municipal law, and (3) that even if the British Government had the right, it was under no obligation to exercise it.

The American contention rested upon the assumption (1) That the privileges accorded to foreign public ships are revocable at will; (2) that a belligerent State not recognized as a nation does not possess the same belligerent privileges as a recognized State. The immunities now extended to public vessels, however they may have originated, undoubtedly now form part of international usage. They have no right to enter foreign ports, but if admitted, are entitled to all the usual privileges.

Mr. W. E. Hall considered that neither of these assumptions is correct,[1] but Professor Lawrence asserts that the American view that a commission from a belligerent State not recognized as a nation is invalid, although not law, might be made law with advantage.[2]

The wide view adopted by the Tribunal would, he admits, add enormously to the burdens of neutrality, and would probably bring about serious conflicts between neutral States and belligerents whose vessels were seized. But he contends that the practical immunity enjoyed under the narrower view is obviously unfair, since unrecognized States cannot be held responsible for offences committed by their cruisers, and if the cruisers themselves cannot be touched when once they have completed their offence and become fully commissioned, absolute immunity is secured to them and their principals, and no remedy exists for a grave international wrong.

To deny to commissions granted by a *de facto* Government validity, would, said Sir Alexander Cockburn, be to deprive the recognition of belligerency of all the effects it was intended to have. It is admitted among nations that such a recognition may be made by a neutral State. Its purpose is to invest the *de facto* Government with the character of a belligerent power, for the common benefit of both belligerent and neutral, without any recognition of independence or sovereignty. The recognition would plainly be idle if it did not carry with it one of the most important rights incidental to a belligerent Government, that of commissioning and employing vessels of war, and of having those vessels, when sailing under its flag and armed with its commission, invested with the privileges conceded to ships of war, and therefore exempted from the jurisdiction of any neutral country in whose waters they may be.

[1] Atlay's "Hall," p. 623. [2] "Principles," p. 553.

In time of peace, by the universal comity of nations, the ports and waters of every nation are open to all comers. But in time of war the neutral sovereign may make what restrictions he pleases upon his hospitality, provided he treats both belligerents alike and gives them due notice.

This power would appear to meet Professor Lawrence's objection that a neutral had no remedy. He has only to publish his intention to refuse hospitality, facilities for repairs, coals, provisions, or to impose other restrictions, and he is then entitled, if these are violated, to exact the necessary reparation, even to the extent of declaring himself at war with the offender.

The tenders to the "Florida" followed her fate, the Tribunal being unanimously of opinion that they were properly to be regarded as accessories. They were the "Clarence," the "Tacony," and the "Archer."

The Tribunal was unanimous in the case of the "Shenandoah" that, prior to her entry into the port of Melbourne, Great Britain was not chargeable with any failure in the use of due diligence to fulfil the duties of neutrality.

But by a majority of three to two it was declared that by the clandestine augmentation of her force, by the enlistment of men during her stay at that port, Great Britain had failed to fulfil the duties prescribed by two and three of the Rules.

In dissenting from the decision of the majority, Sir Alexander Cockburn said:—

"Looking to the Regulations and the distance of the vessel from her nearest port, I cannot agree with the President that too much coal was allowed. I cannot agree that repairing or taking in coal at a particular port on the way to some ulterior operation makes the port a base of naval operations; still less that the neutral can be affected thereby when he is ignorant of the ulterior operation so contemplated. I cannot agree that where the government of a colony is honestly desirous of doing its duty and maintaining neutrality, the fact that men anxious to ship on board a belligerent vessel elude the vigilance of the police in the night time is to make the parent State liable for all the damages such vessel may afterwards do. And I protest respectfully, but emphatically, against a decision based on grounds, to my mind, so wholly untenable."[1]

The most serious question here was coaling and refitment whereby "the main operation of the naval warfare" of the "Shenandoah" had been accomplished. But a port is not made the base of naval operations by an isolated instance. Continued use is the test. If an act otherwise innocent is repeated then the neutral may infer that it is intended to assist in warlike operations. When a vessel, therefore, whilst carrying on hostilities, uses

[1] Parliamentary Papers, 1873; North America (No. 2), 226.

neutral ports for these purposes without revisiting her own, a neutral, both then and now, is bound to prevent such acts within his own jurisdiction. At this period ships of war were, by the English regulations, only allowed to receive sufficient coal to take them to the nearest port of their own country, and they were not allowed to receive a second supply, in the same or any other port, without special permission within three months.

The regulations of the United States were, in 1870, similar. To furnish supplies in excess of the necessities of the case is to assist the belligerent in his warlike operations, and consequently to violate the essential principles of neutrality.

The "Georgia."—In the case of the "Georgia," the Tribunal was unanimously of opinion that Great Britain had not failed by act or omission to fulfil any of the duties prescribed by the Rules, or by the principles of international law. The "Sumter," the "Nashville," the "Tallahassee," and the "Chickamanga" were similarly acquitted, and it was also unanimously decided that the cases of the "Sallie," the "Jefferson Davis," the "Music," the "Boston," and the "V. H. Joy" ought to be excluded from consideration for want of evidence.

Effect of the Decree.—Just as the arbitrators failed to agree amongst themselves upon the general principles which they sought to establish, so the jurists are not agreed upon the practical value of their decisions.

Due Diligence.—The arbitrators laid down that due diligence

"ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."

This definition, says Professor Lawrence, accepts the principle of a shifting standard. It imposes different degrees of responsibility upon different neutrals in the same war, and even upon the same neutral in respect of different belligerents in the same war, and thus destroys that impartiality which is the essence of neutral duty.

The analogy adopted by Sir Alexander Cockburn of the diligence required of the *bonus et diligens pater familias* of the civilians appears to be the true one. The offence most clearly analogous to the one under discussion is that of smuggling, and Professor Lawrence suggests that the kind and amount of diligence exercised by the "well-regulated, wise, and conscientious Government" of Sir Alexander in suppressing smuggling ought to be the standard which mutual States should seek to maintain in fulfilling these obligations of neutrality.

Another analogy is suggested by M. Tetens, who says :—

"The maximum of precaution in this case is to maintain and enforce the observance of neutrality in vessels and cargoes with the same diligence and exactness as are exercised in inquiries and other proceedings relative to taxes or imposts and customs. He who does as much to prevent a wrong meditated against another as he does for his own protection satisfies every just and reasonable expectation on the part of that other."[1]

Intent as the Test of Guilt.—It has already been shown how in the American view the intent of the parties concerned in the equipment and armament of a vessel in neutral waters is the cardinal principle upon which the Courts acted. The difficulty is to determine in each particular case whether it is a case of sale of a contraband article or whether it is, in fact, a hostile expedition. When the determination rests upon intention, the practical difficulty, and often impossibility, of establishing such proof as would establish a *prima facie* case, as distinct from mere suspicion, is enormous.

Instead of intent being regarded as the crucial test, Mr. Hall suggests that the character of the ship should form the criterion of the offence. Experts, he argues, are perfectly well able to distinguish vessels built primarily for warlike purposes from those constructed primarily for commercial use. But since every fast merchant vessel with but a small armament is capable of inflicting a maximum of damage upon its enemy's trade so long as it escapes encounter with a more heavily-armed cruiser, this suggested rule breaks down.

Indeed, Mr. Hall admits as much when he says :—

"Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition outside neutral waters without paralysing the whole shipbuilding and ship-selling trade of the neutral country."[2]

Such restrictions would be intolerable, and thus we are thrown back upon the test of intent. One method by which proof of intent can be obtained is that adopted in the Foreign Enlistment Act, 1870, to which reference will shortly be made.

Professor Lawrence adopts the test of character as explained by Professor Hall. He thinks if the construction and equipment of ships unequivocally adapted for war were ruled out, belligerents

[1] Reddie's "Mar. and Int. Law," Vol. II, 203.
[2] Atlay's "Hall," 616.

would be wise in submitting to the free sale of purely commercial vessels. But as already stated, a fast merchantship with a few powerful guns is just as dangerous to trade, within certain limits, as a fully-armed ship of war. No belligerent could be expected to submit to having its trade driven off the seas, as would infallibly be the case under such a rule. Even with two or three such cruisers as the "Alabama," the commerce of the United States was practically wiped out.

The following resolutions, based upon the "Rules," were adopted by the Institute of International Law at the Hague in 1875 :—

"1. L'État neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque par la prestation de secours militaire à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation ou de point de départ à des expeditions hostiles contre l'un d'eux ou contre tous les deux.

"2. En consequence l'État neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des États belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseaux de transport militaire, en vue de l'aider à poursuivre la guerre. En outre l'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.

"3. Lorsque l'État neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher et de pour suivre comme responsables les individus qui violent les devoirs de la neutralité.

"4. De même l'État neutre ne doit ni permettre ni souffrir que l'un des belligérants fasse de ses ports ou de ses eaux, la base d'opérations navale contre l'autre, ou que les vaisseaux de transport militaire se servent de ses ports ou de ses eaux, pour renouveler ou augmenter leurs approvisionnements militaires ou leur armes, ou pour recruter des hommes.

"5. Le seul fait matériel d'un acte hostile commis sur le territoire neutre, ne suffit pas pour rendre responsable l'État neutre. Pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (Dolus), soit d'une négligence manifeste (Culpa).

"6. La puissance lésée par une violation des devoirs de neutralité n'a le droit de considérer la neutralité comme éteinte, et de recourir aux armes pour se défendre contre, l'État qui l'a violée, que dans les cas graves et urgents, et seulement pendant la durée de la guerre. Dans les cas peu graves ou non urgents, ou lorsque la guerre est terminée, des contestations de ce genre appartiennent exclusivement à la procédure arbitrale.

"7. Le tribunal arbitral prononce *ex bono et æquo* sur dommages intérêts que l'État neutre doit, par suite de sa responsabilité payer a l'État lésé, soit pour lui-même, soit pour ses ressortissants."[1]

[1] "Annuaire de l'Inst. de Droit Int.," 1877, p. 139.

Validity of Commission.—It is unnecessary to say more on this point, except that the Tribunal, whilst leaving undisturbed the established rule that a commission granted by an independent State entitled the vessel to be treated as a public ship, left unsettled the question of its validity when granted by a belligerent State not yet recognized as independent. The Tribunal majority decision of its invalidity is quite impracticable, and there appears to be little chance of its acceptance by other nations. It was one of the terms of the Treaty of Washington that the parties thereto should observe for the future, as between themselves, the "Rules," bring them to the knowledge of other Maritime Powers, and invite such Powers to accede to them. But the two Powers have never been able to come to any agreement as to the construction to be placed upon the "Rules," and consequently have been unable to settle a joint note of invitation, and, since 1876, have given up any attempt to do so. It is even a matter of doubt whether, under these circumstances, the parties to the treaty are bound by "rules" which they have found it impossible to interpret to their mutual satisfaction.

Instead of settling disputed points, fresh difficulties have been created. At the same time it must not be forgotten that a higher standard of international morality has been set up, to which it behoves other nations to endeavour to respond, under the penalty of being held responsible by the injured belligerent.

The outcome of the Royal Commission appointed in 1868 to inquire into the effect of the Foreign Enlistment Act, 1819, was the Act of 1870 bearing the same title. In recommending several alterations in the law, the Commissioners declared that they had not felt themselves bound to consider whether they were exceeding the existing requirements of international law, but they felt that if their recommendations were adopted the municipal law available for the enforcement of neutrality would derive increased efficiency, and would be brought into fuller conformity with Great Britain's international obligations.[1]

The Act passed in accordance with these recommendations has, no doubt, greatly strengthened the hands of the authorities, but it has gone far beyond the duties hitherto imposed upon neutrals by international law or usage. It has created an offence entirely new, and whilst removing the difficulty created by the old doctrine of intent, it has reversed the principle, hitherto a marked feature in English law, of compelling the claimant to prove his case. In the case of illegal shipbuilding the onus of proof of innocent intent is thrown upon the shipbuilder.

[1] Report of Neutrality Laws Commission, 1868, p. 7.

It is interesting to recall that Sir William Vernon Harcourt, who was a member of the Commission, presented a strongly worded minority report against the new departure. His objections may be summarized as follows: (1) A new duty would be created which it would be difficult, and probably impossible, to execute. (2) In creating such a duty, this country would incur a new responsibility for its non-performance. (3) The attempt to execute it would be odious to our own subjects, since a *new crime* was thereby created, and the failure to punish it would be a just ground of complaint to foreign States. (4) The trade of the country (Great Britain being the dockyard of the world) would be placed at an uncalled-for disadvantage as compared with that of the rest of the world.[1]

It is foreign to our purpose to deal here with the provisions of the Act relating to illegal enlistments.

The following are the provisions relating to illegal shipbuilding and illegal expeditions contained in the Foreign Enlistment Act, 1870.[2]

"8. If any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts, that is to say—

"(1) Builds or agrees to build or causes to be built any ship, with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

"(2) Issues or delivers any commission for any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

"(3) Equips any ship with intent or knowledge or having a reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or

"(4) Despatches or allows to be despatched any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:—

"(1) The offender shall be punishable by fine and imprisonment or either of such punishments at the discretion of the Court before which the offender is convicted; and imprisonment if awarded may be either with or without hard labour;

"(2) The ship in respect of which any such offence is committed shall be forfeited to Her Majesty: Provided that a person building or causing to be built or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid,

[1] Parl. Pa., 1868, Report Neut. Com., App. 7.
[2] 33 & 34 Vict. c. 90.

shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; (that is to say)—

"(1) If forthwith upon a proclamation of neutrality being issued by Her Majesty he give notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to or done or to be done under the contract as may be required by the Secretary of State:—

"(2) If he gives such security and takes and permits such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid.[1]

"9. When any ship is built by order of or on behalf of any foreign State when at war with a friendly State, or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State or is paid by such foreign State or such agent, and is employed in the military or naval service of such foreign State, *such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed* in the military or naval service of such foreign State.

"10. If any person within the dominions of Her Majesty and without the licence of Her Majesty—

"By adding to the number of guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State at war with any friendly state—

"Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments at the discretion of the Court before which the offender is convicted; and imprisonment if awarded may either be with or without hard labour.

"11. If any person within the limits of Her Majesty's dominions and without the licence of Her Majesty—

"Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:—

"(1) Every person engaged in such preparation or fitting out or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments at the discretion of the Court before which the offender is convicted; and the imprisonment, if awarded, may be either with or without hard labour.

[1] Qu., whether this sub-section is not limited to an original equipment, leaving section 10 to deal with equipments of vessels already in belligerent service. See "Coal for Russia," in "Monthly Magazine," February, 1905. Otherwise a belligerent warship could not take in a gallon of water without the royal licence under the sign-manual.

"(2) All ships and their equipments and all arms and munitions of war used in or forming part of such expedition shall be forfeited to Her Majesty.

"12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

"13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

"ILLEGAL PRIZE

"14. If, during the continuance of the war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship, which may have been built, equipped, commissioned or despatched or the force of which may have been augmented contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions by the captor or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize or his agent or for any person authorized in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall on due proof of the facts order such prize to be restored.

"Every such order shall be executed and carried into effect in the same manner and subject to the same right of appeal as in the case of any order made in the exercise of the ordinary jurisdiction of such Court; and in the meantime and until a final order has been made on such application the Court shall have power to make all such provisional and other orders as to the care and custody of such captured ship, goods, or merchandise and (if the same be of perishable nature or incurring risk of deterioration) for the sale thereof and with respect to the deposit or investment of the proceeds of any such sale as may be made by such Court in the exercise of its ordinary jurisdiction."

In view of the fact that the Act of 1870, like the similar Acts of the United States, is in advance upon international law and usage, the question has been discussed how far is a State bound in the interests or at the request of a belligerent to administer its municipal law. In dealing with the claim put forward in the American case that whether the Foreign Enlistment Act, 1819, was or was not more than co-extensive with international obligations, the United States were entitled irrespectively of the rules of the Treaty of Washington to have it put in force in all its rigour for their protection, Sir Alexander Cockburn said:—

"When a Government makes its municipal law more stringent than the obligations of international law would require, it does so, not for the benefit of foreign States, but for its own protection, lest the acts of its subjects in overstepping the confines, oftentimes doubtful, of strict right, in

transaction of which a few circumstances, more or less, may alter the character, should compromise its relations with other nations. It was in this spirit that the Foreign Enlistment Act was passed, as is shown by its preamble. . . . Now it is quite clear that the obligations of the neutral State spring out of and are determined by the principles and rules of international law, independently of the municipal law of the neutral. They would exist exactly the same, though the neutral State had no municipal law to enable it to enforce the duties of neutrality on its subjects. It would obviously afford no answer on the part of a neutral Government to a complaint of a belligerent of an infraction of neutrality, that its municipal law was insufficient to enable it to ensure the observance of neutrality on its subjects. The reason being that international law, not the municipal law of that particular country, gives the only measure of international rights and obligations. While, therefore, on the one hand, the municipal law, if not co-extensive with the international law, will afford no excuse to the neutral, so neither, on the other, if in excess of what international obligations exact, will it afford any right to the belligerent which international law would fail to give to him. In one respect, and in one respect only, does the municipal law, when in excess of international law, give a right to the belligerent. Equality being of the essence of neutrality, he has a right to insist that the neutral subject shall equally be compelled to keep within the municipal law in dealing with the adversary as when dealing with himself. A belligerent is also beyond question perfectly at liberty to urge upon the neutral Government, in the way of solicitation or even of remonstrance, to enforce the municipal law; but so long as it is not enforced against himself, he has no right to redress, because it is not put in force against his enemy."[1]

This is undoubtedly a correct statement of the law, but as Mr. Hall points out, municipal laws may develop into a course of conduct of which foreign States will expect to receive the benefit. The repeated enforcement of a law or continued acquiescence in its requirements creates in the minds of the people the measure of their duties. As long as this standard is maintained all foreign States are justified in expecting to reap the full benefit, and if any State is disappointed in this expectation, it may justly expect the offending State to harbour unfriendliness. There will therefore always exist a danger in enacting or retaining municipal provisions of this character which are in excess of international usage.

Decisions on the Foreign Enlistment Act, 1870.—The first application under the Act to the Court of Admiralty was that of the "International."[2] In this case an English telegraph company during the Franco-German war entered into an agreement with the French Government to lay certain submarine cables between places on the French coast, in such a manner that they

[1] Parl. Pa., 1873, N. America (No. 2), p. 29.
[2] L. R., 3 Ad. and Ecc., 321 (1871).

could be connected by land wires and so form a single line of telegraphic communication between Dunkirk and Verdon, on the mouth of the Garonne. In pursuance of this agreement, dated 28 November, 1870, the cables were shipped on the company's steamship "International," which on the point of departure was, by order of Earl Granville, Secretary of State for Foreign Affairs, seized and detained upon the ground that she was about to be despatched contrary to the Foreign Enlistment Act, 1870. On motion for the release of the vessel, it was proved to the satisfaction of the Court that the undertaking was of a commercial character; that the object of the contract was to furnish ordinary postal telegraphy, and that the company were not parties, directly or indirectly, to any project for adapting the line to military purposes. In ordering the release of the ship, Sir Robert Phillimore said:—

"The company is formed to furnish ordinary postal telegraphy, and the contract with the French Government is to furnish telegraphy of this kind only; no other kind is to be furnished. It is inapt, *per se*, for land telegraphy, much more for military telegraphy; it is credibly sworn, I think, that the applicants are no parties, directly or indirectly, to any intention or project of adapting this, so to speak, civil telegraphy to military purposes; no such adaptation is within the letter or spirit of this contract. The present circumstances of France are certainly such as to make the means of communication between her armies and her Government of the utmost value to her. It is probable that this telegraphic line from Dunkerque to Verdon will be partially used for effecting or endeavouring to effect such communication. But neither does this appear to be the main object of the line, nor could it, without additions and adaptations, with which this company has no concern, be made even partially to subserve this end. On the other hand, there is nothing incredible in the statement that commercial interests are largely concerned in the establishment of a postal telegraphic line between Dunkerque and Verdon, due regard being had to the great and increasing commercial importance of Bordeaux. It is, however, probable, as I have said, that the line may be occasionally used for military purposes; but such probability is not sufficient to divest the line of its primary and paramount commercial character, and to subject this company to the very severe penalties imposed by the statute."

In view of the "reasonable and probable cause" for detention and for putting the applicants on their defence, no order was made as to costs.

The "Gauntlet"[1] was a case in which a French ship of war during the same war captured in the English Channel a Prussian vessel, and put a prize crew on board. The prize was driven by stress of weather into the Downs, anchored within British waters, and after lying there for two days the French Consul at Folkstone engaged the British steam-tug "Gauntlet" to tow the prize

[1] L. R., 4 P. C., 184 (1871).

to Dunkirk. On 26 November, 1870, the "Gauntlet" accordingly towed the prize as agreed, and on her return a suit was commenced on behalf of the Crown for the condemnation of the tug for violation of the Act. It was held by Sir Robert Phillimore in the Court of First Instance that the circumstances of the case did not warrant him in pronouncing that the "Gauntlet" was forfeited, on the ground of her having been despatched with reasonable cause of belief that she was employed in the naval service of France. He accordingly dismissed the petition with costs against the Crown.

Upon appeal to the Judicial Committee of the Privy Council, this decree was reversed. The Court had no doubt

"that sending an English steam-tug for the express purpose of taking the detached prize crew, its prisoners and booty, speedily and safely to French waters, where the prisoners, prize, and booty would be taken charge of by the French authorities, and the prize crew set free to rejoin and strengthen their own ship, was despatching a ship for the purpose of taking part in the naval service of the belligerent, within the plain meaning, the words and the spirit of the Act."

In the case of Reg. *v.* Sandoval[1] the defendant, a foreigner residing in this country, was indicted, together with Sir William Call and one Baird, under the eighth and eleventh sections of the Act. Sandoval was convicted under section 11; the jury disagreed in regard to Sir William, and the prosecution was withdrawn against Baird.

The facts were as follows:—

Whilst in England, Sandoval bought two Krupp guns at Sheffield and a quantity of ammunition at Birmingham. He sent the guns to Woolwich to be fitted with carriages suitable for use at sea. This armament was sent to Antwerp and transferred to the "Justitia," which had been purchased in England by Sir William in the name of his valet.

Sandoval assumed the command of the "Justitia," which cleared for Trinidad with "machinery for mines." On board were three generals. She carried no cargo except coal and the armaments. Off Trinidad she was transferred to General Pulgar, and a foreign flag hoisted in place of the English. She then made for the mainland of Venezuela, where she took in tow a flotilla of boats filled with armed men, and after harmlessly shelling a custom house, engaged with a Venezuelan man-of-war and was worsted, one of the generals being killed. She retired to San Domingo, where she was seized by the authorities and the crew sent back to England.

[1] 56 L. T. R., 526; 16 Cox, C. C., 206; 3 T. L. R., 411, 436, 498.

Upon an application for a new trial, Day, J., said :—

"It is said that this expedition represented a *bona fide* commercial transaction; that the ship's papers were thoroughly regular (which one might expect in a transaction which was not *bona fide*), and that there was nothing inconsistent with a mercantile adventure; but that was for the jury to judge of. Again, it was said that there was no evidence that the defendant did 'prepare or fit out' an expedition within the Queen's dominions. But I am clearly of opinion (if we are to make use of our common sense) that there was abundant evidence of preparation and fitting out of an expedition. Mr. Grain has urged that there is no offence unless there has been a complete fitting-out and equipment; that the ship must take her last biscuit on board. But the Act was passed to prevent such mischief as the present, and I am of opinion that the moment any overt act of preparation is done the statutory offence is committed, so that such attempts may be defeated and the mischievous consequences likely to ensue to this country may be prevented."

It is sufficient to merely notice here that Dr. Jameson and other officers acting with him in the outrageous Raid were convicted under section 11 of the Act. It was held in Reg. *v.* Jameson[1] that if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence, even though he renders the assistance from a place outside Her Majesty's dominions.

Before the actual outbreak of the war between China and Japan, an armed vessel, the "Tatsuta," built in the Tyne for Japan, left our shores; but from the declaration of war, so close a watch was kept by our customs officials upon all building yards, that no accession of strength from that quarter was received by either combatant. Thus when the "Diogenes," built at Blackwall, and evidently fitted for war, was about to proceed to the mouth of the Thames for her trial trip, the Foreign Office, which had been kept informed of the progress of the ship, communicated with the Admiralty, in consequence of which a force of bluejackets and marines were sent on board to see that she did not leave British waters.

In the Royal Proclamation[2] of 11 February, 1904, in the war between Russia and Japan, in addition to the provisions relating to Illegal Enlistment, Illegal Shipbuilding, and Illegal Expeditions being set forth according to the usual practice, British subjects and all persons under British protection are warned to observe the laws of neutrality, and not to act in violation of the law of nations, under the penalties declared by such law.

[1] [1896] 2 Q. B., 425.
[2] "Lond. Gaz.," 12 February, 1904.

The Three Rules.—M. Charles Calvo argues with considerable force that the three Rules do not constitute any innovation in international law. It must be remembered that both parties to the treaty admitted that they were creating an alteration in international practice, and that it is so expressed in the treaty. After having cited the enactments of various maritime powers dealing with the offence under discussion, M. Calvo declares :—

"Que les trois règles, loin de constituer une obligation nouvelle et inconnue à l'époque de la signature du traité de Washington, étaient antérieurement et depuis longtemps consacrées par la legislation de la plupart des Etats, par au grand nombre de leurs documents officiel et de leurs traités internationaux, qui sans en reproduire la lettre textuelle et expresse, en renfermaient ou impliquaient l'esprit ou la portée, il nous reste à rechercher si ces mêmes règles sont déja passeés dans le domaine des faits, et dans ce cas, de quelle manière et en quelles circonstances elles ont été appliquées, dans quelle mesure elles sont entrées dans la pratique des nations."[1]

Although M. Calvo produces much authority for his contention that the three Rules do not constitute any innovation upon international law, we have seen that the framers of the treaty were clearly of the opinion that they did. If not, why did they provide that "the general principles" of public law should not be construed in any sense inconsistent with the Rules, instead of providing that the Rules should not be construed in any sense inconsistent with "the general principles" of public law? Whilst, however, approving the Rules, M. Calvo considers them to be insufficient for the purpose for which they were framed, unless they are supplemented by the principles of the inviolability of private property at sea.

"Nous croyons donc que le moyen le plus efficace pour porter remède au mal, serait de faire entrer dans la pratique unanime et definitive des nations l'abolition de la course, et l'interdiction du commerce de la contrebande de guerre—mesures qu'avaient déjà recommandées, à la suite de la guerre d'Orient, les plénipotentiaires des grandes puissances réunis en Congrès à Paris,—mais en les complétant par l'adoption d'un principe qui en est, à nos yeux, le fondement en même temps que la guarantie, et que les Etats-Unis avaient posé comme condition de leur acquiescement à la déclaration du 16 Avril 1856 Nous voulons parler du principe de l'inviolabilité de la propriété privée sur mer en temps de guerre. . . ."

After tracing the history of the principle of the inviolability of private property except contraband at sea in time of war contained in various treaties and declarations, M. Calvo submits a model form of treaty designed to carry out these provisions for exempting

[1] Examen des Trois Règles de Droit International proposées dans le Traité de Washington (1874).

private property from injury, except it prove to be contraband of war or is carried in breach of the law relating to blockade.

Foreign Enlistment Laws of Other Nations.—Prior to the American War of Secession, with the exception of Great Britain and the United States, none of the leading maritime Powers prohibited the equipment or armament of vessels intended for the use of belligerents, except under circumstances which rendered such action a violation of neutrality, according to the law of nations.

France.—The only provisions relating to such violation of the laws of neutrality by a French subject are to be found in the Penal Code, which render liable to punishment all persons exposing the State to declarations of war or reprisals :—

"Article LXXXIV. Quiconque aura, par des actions hostiles non approuvées par le Gouvernement, exposé l'Etat à une déclaration de guerre, sera puni du bannissement, et si la guerre s'en est suivie, de la déportation.

"Article LXXXV. Quiconque aura par des actes non approuvées par le Gouvernement exposé des Français à éprouver des représailles séra puni du bannissement."

In the application of these Articles, said M. Treitt, counsel to the British Embassy in Paris, three conditions are essential :—

1. Que l'action soit hostile.
2. Que l'action n'ait pas été approuvée par le Gouvernement.
3. Que la France a été exposée à une déclaration de guerre ou des Français exposés à des représailles.

"Je précis," he writes, "ces trois circonstances, parceque c'est le pouvoir judiciare seul qui est appelé à les résoudre et à décider de la culpabilité si les juges décident que telle action n'est point une action hostile, et par conséquent non violatrice de la neutralité, le Gouvernement devra respecter cette décision et pourra l'opposer au belligérant qui se plaindrait si devant les juges l'accusé excipiat d'une approbation, soit tacite, soit expresse par le Gouvernement, l'action incriminée ne pourrait plus être punie.

"Enfin, si l'action hostile n'avait pas pour conséquence des représailles ou une éventualité de guerre elle cesse d'être criminille."

Under the Civil Code, by Article XXI all Frenchmen were prohibited from taking foreign service without licence, and by Article LXVII of the Decree, "disciplinaire sur la marine marchand" of 24 March, 1852, all French sailors were forbidden to serve without licence upon a foreign vessel.

Although the sale of armed vessels was not an offence against neutrality, and was thus not within Articles LXXXIV and LXXXV, yet the Government had the power of preventing the arming of vessels, since the exportation of powder and arms was

prohibited under heavy penalties, not, indeed, with the motive of preventing breaches of neutrality, but from motives of internal policy. As M. Treitt observed :—

"Les poudres et les armes de guerre ne jouissent point de la liberté commerciale et industrielle du droit commun, ces deux objets sont sous la surveillance rigoureuse du Gouvernement et il est fort difficile que l'on puisse armer des navires ou bien faire voyage ou effectuer des dépôts de poudre et d'armes de guerre sans que le Gouvernement ne soit averti et ne puisse les empêcher."[1]

Of course, if the construction, equipment, or arming of the vessel was with hostile intent, then it would form a breach of neutrality, and fall within Articles LXXXIV and LXXXV. Upon the outbreak of the American Civil War, by Article III of the Imperial Decree of 10 June, 1861,

"Il est interdit à tout Français de prendre commission de l'une des deux parties pour armer des vaisseaux en guerre, ou d'accepter des lettres de marque; pour faire la course maritime, *ou de concourir d'une manière quelconque à l'équipment ou d'une navire de guerre ou corsaire de l'une des deux parties.*"

Articles LXXXIV and LXXXV were specially referred to as applicable to contraventions of this proclamation.

Thus the law was placed upon the same footing as that of Great Britain and the United States, and the attempts made by Confederate agents, who had failed in England, were frustrated. Six vessels in the course of construction for the Confederate States were seized.

By the proclamation of neutrality of 6 May, 1877, in the war between Russia and Turkey, in calling attention to the municipal law and the law of nations on the subject, taking service by land or sea with the belligerents, or conspiring in the equipment or armament of a vessel of war for the use of the belligerents was prohibited.[2]

This proclamation was repeated in the war between the United States and Spain by the Notification of Neutrality of 27 April, 1898.[3]

Belgium.—Under the adopted French codes, Belgium enjoys the same provisions as those just mentioned, and with the exception of severe laws against privateering or the reception of privateers contained in the Proclamation of Neutrality during the Crimea War, the prohibition and preventive power of the law depends on the above provisions.

[1] Parl. Pa., Neut. Laws Com. Rep., App., 45.
[2] State Papers, Vol. LXVIII, p. 782.
[3] *Ibid.*, Vol. XC, p. 364.

In its Proclamation of Neutrality, 8 May, 1859, on the occasion of the Italian War, the Government notified that—

"Toute personne soumise aux lois du royaume qui ferait des armaments en course ou y prendait part, ou bien qui poserait des actes contraires aux devoirs de la neutralité, s'exposerait d'un côté à être traité comme pirate à l'étranger, et de l'autre poursuivie devant les tribuneaux Belges suivant tout la rigueur des lois."

This proclamation was repeated 22 June, 1861, on the outbreak of the American Civil War; 11 July, 1865, in the war between Brazil and Paraguay; 18 February, 1866, in the war between Spain and Chili; 14 March, 1866, in the war between Spain and Peru.

In the Proclamation of Neutrality of 6 May, 1877, on the occasion of the Russo-Turkish War, the Government took the opportunity of reminding its subjects of the permanent neutrality of Belgium. At the same time it directed attention to Article CXXIII of the new Penal Code:—

"Quiconque par des actions hostiles non approuvées par le Gouvernement, aura exposé l'état à des hostilités de la part d'une Puissance étrangère sera puni de la détention de 5 ans à 10 ans, et si des hostilités s'en sont suivies, de la détention de 10 ans à 15 ans."

This was repeated in the war between the United States and Spain by the Notification of 26 April, 1898.[1]

The Netherlands.—Under the adopted French Codes, the Netherlands are subject to the same provisions. In the Proclamation of Neutrality, 17 March, 1866, there is no reference to the sale or equipment of *ships of war*, but all inhabitants are warned not to meddle with *privateering* and not to accept letters of marque. Any such conduct was declared to be hostile and within Articles LXXXIV and LXXXV of the Penal Code. By Article VI of the Proclamation, it was forbidden to furnish to the ships of war of either of the belligerents weapons or ammunition, as well as to aid in any way to the increase of their weapons or accoutrements.

And the Government further declared its intention of keeping strict watch against the fitting out of armed ships on behalf of belligerents and against any such participation by Dutch subjects.

In the Proclamation of Neutrality of 3 May, 1898, in the war between the United States and Spain, Dutch subjects are warned to refrain from acts which may be at variance with neutrality, from engaging in the service of the belligerents, or in the fitting out of privateers, and from breaking blockade or supplying war stores

[1] State Papers, Vol. XC, p. 378.

and other contraband articles, and especially to observe the following articles of the Penal Code :—

"Article C. (1) All persons who, in case of war in which the Netherlands is not engaged, wilfully do any act by which the neutrality of the State is imperilled, or who wilfully violate any particular order for maintaining neutrality issued and published by the Government, shall be punished with imprisonment not exceeding six years.

"Article CCCLXXXVIII. All Netherland subjects who, without permission from the Netherland Government, accept a letter of marque or take service as captains on vessels knowing that they are intended for privateering, without permission of the Netherland Government, shall be punished with imprisonment not exceeding four years.

"Article CCCLXXXIX. All Netherland subjects who take service as sailors on a vessel knowing that, without permission of the Netherland Government, it is intended to be used for privateering, or of their free will continue in service after they have found out its destination or intended use, shall be punished with imprisonment not exceeding three years."

By Notification 1 of this Proclamation, Article VI of the Proclamation of 1866 is repeated and extended as follows :—

"Article I. It is prohibited to furnish to the warships or privateers of the belligerents arms or ammunition, as also to help them in any way to increase their *crews*, arms *or equipment*.

"Article II. Furthermore are prohibited: (*a*) The fitting out in this country of warships or other vessels destined for military purposes for the use of the belligerents, as also the procuring *or selling* of the aforesaid vessels to the parties aforesaid. (*b*) The exportation of arms, ammunition, or other war material to the belligerents. In this must be included the exportation of everything ready for immediate use in war, but not that of unmanufactured materials, unless these are chiefly made up for warlike purpose. (*c*) The enrolment within the territory of the State of soldiers for the belligerents. (*d*) The organization, in a military sense, of volunteers in the territory of the State with the object of joining the army of one of the belligerent parties."[1]

Italy.—Beyond certain differences in the character and applications of penalties, the provisions of Italian law are similar to those of France. Under the Naval Code, chapter VII, and the Proclamation of 6 April, 1864, in no case is a belligerent ship of war to avail itself of an Italian port for the purposes of war or of obtaining arms and ammunition; and it is not, under the pretence of repairs, to execute any alterations or other works designed to augment its warlike force. Nothing is to be furnished to vessels of war or to belligerent privateers beyond articles of food and commodities, and the actual means of repair necessary to the sustenance of the crews and the safety of navigation.

By Article IV of the Proclamation, no Italian subject may

[1] State Papers, Vol. XC, 370.

take a commission from either belligerent to arm ships for war or to accept letters of marque to cruise or to assist in any way in fitting out, arming, or preparing for war vessels or privateers of belligerents. And by Article V, no Italian subject may be enrolled or take service on any ship of war or privateer belonging to belligerents. Upon the outbreak of the war between Russia and Turkey, the Government contented itself in its Proclamation of Neutrality of 28 April, 1877, with warning its subjects to scrupulously observe the duties of neutrality in accordance with the laws in force and with the general principles of international law. The same course was pursued in the war between the United States and Spain by the Proclamation of Neutrality of 25 April, 1898.[1]

Spain:—Article CXLVIII of the Penal Code, and Article CCLVIII of the Statute of 1822, correspond to Articles LXXXIV and LXXXV of the French Code.

"Article CXLVIII. Whosoever shall, without having been permitted to do so by competent authority, have provoked or given motive to a declaration of war against Spain on the part of another Power, or shall have exposed Spanish subjects to suffer vexations or reprisals against their persons or properties, shall be punished with imprisonment; and if such person be a public functionary, he shall be punished with temporary seclusion.

"Article CCLVIII. Whosoever shall, without the knowledge, authority, or permission of the Government, have committed hostilities against any allied or neutral Power, or shall have exposed the State to suffer for that cause a declaration of war, or if such hostilities shall have been the ground for reprisals against Spaniards, he shall be condemned to give public satisfaction for such offence, and to seclusion or imprisonment for a term of from two to six years, and shall pay a fine equal to one quarter of the amount of damages he shall have occasioned without prejudice to any further punishment which he may be liable to incur for the violence committed. If said hostilities shall have brought on an immediate declaration of war, or if such declaration shall have preceded the time of the trial, the offender shall be punished with transportation.[2]

Under the Proclamation of Neutrality of 17 June, 1861 :—[3]

"Article I. The fitting out, supplying, and equipment of any privateer in any of the ports of the monarchy is prohibited, whatever may be the flag which she may hoist.

"Article II. The proprietors, masters, or captains of merchant vessels are also prohibited from receiving Letters of Marque, and from contributing in any way to the armament and equipment of vessels of war or privateers.

[1] State Papers, Vol. XC, 377.
[2] Parl. Pa. App. to U.S. Counter-Case, p. 1062.
[3] Foreign Relations, 1872, U.S. Counter-Case, p. 91.

"Article III. Ships of war or privateers with prizes are prohibited from entering and remaining for more than twenty-four hours in the ports of the monarchy except in the case of forced arrival.

"When the latter shall occur, the authorities shall watch the ship and shall oblige her to put to sea as soon as possible, without permitting her to supply herself with anything more than that which is necessary for the moment, but under no circumstances with arms or with munitions of war.

"Article V. . . . The carrying of effects of war and of papers or communications for the belligerents is prohibited. Contraveners will be responsible for their own acts, and will have no right to the protection of my Government.

"Article VI. All Spaniards are prohibited from enlisting in the belligerent armies and from engaging themselves for service in vessels of war or privateers."[1]

It will be observed that there is no reference to the sale, construction, or equipment of vessels of war. Fitting out and equipment is confined to the case of privateers.

In the Notification of Neutrality of 12 May, 1877, in the war between Russia and Turkey, Spanish subjects were warned not to perform any hostile act which might be considered contrary to the most perfect neutrality, and national and foreign agents were threatened with the penalties prescribed by Article CL of the Penal Code if they carried out or promoted the recruiting of soldiers for either of the belligerent armies or navies.[2]

Portugal.—Article CXLVIII of the Penal Code of 10 December, 1852, embraces the provisions of Articles LXXXIV and LXXXV of the French Code.

By Article CLVI the procuring of arms, vessels, or munitions of war is prohibited.[3]

By the Proclamation of Neutrality of 5 May, 1854, Portuguese subjects and foreigners residing in Portugal were, by Article II, prohibited from constructing or arming vessels to be employed as privateers, and letters of marque to such persons were refused. By Article III, privateers and their prizes and belligerent vessels of war were refused admission into Portuguese ports except in case of distress.[4]

By the Proclamation of Neutrality of 2 July, 1856, on the outbreak of the war between Austria and Italy, similar provisions were decreed.

[1] Parl. Pa., Neut. Law. Com. Rep. App. 66.
[2] State Papers, V, 68, 662.
[3] Parl. Pa. Penal Code of Portugal, 1854, p. 76.
[4] State Papers, XLIV, 111.

The Proclamation of Neutrality of 29 July, 1861, issued during the American Civil War, contained the following provisions:—

"Article I. In all the ports and waters of this kingdom as well as on the continent, and in the adjacent islands as in the ultramarine provinces, Portuguese subjects and foreigners are prohibited from fitting out vessels destined for privateering.

"Article II. In the same ports and waters referred to in the preceding Article, is, in like manner, prohibited the entrance of privateers and of the prizes made by privateers or by armed vessels.

"Sec. 1. The cases of overruling necessity (*força maior*) in which, according to the law of nations, hospitality is indispensable, are excepted from this regulation, without permission, however, being allowed in any manner for the sale of any objects proceeding from prizes."[1]

The same provisions were by the Decree of 29 July, 1861, promulgated in the American War of Secession.[2]

Upon the outbreak of war between Russia and Turkey, by a Decree of Neutrality of 14 June, 1877, in view of section 15 of Article LXXV of the Constitutional Charter and of the several Decrees dated 30 August, 1780; 3 June, 1803; 5 May, 1854; 29 July, 1861; and 2 July, 1866, as well as of Articles CXLVIII, CL, CLIV, CLV, CLVI, and CLXII of the Penal Code, and also in view of the principles of the Declaration of Paris, 1856, and of the general principles of the rights and duties of neutrals, the following provisions were decreed:—

"Article I. All Portuguese and foreign subjects are forbidden to equip any privateers in the ports or waters of this kingdom or of any of the adjacent islands or of the transmarine provinces.

"Article II. The entrance of any privateers, as well as of any prizes captured by them or by any vessels of war of the belligerent Powers, into the ports and waters mentioned in the foregoing Article, is likewise prohibited.

"Sec. 1. Any cases of *force majeure*, in which hospitality becomes absolutely necessary in accordance with the law of nations, are excepted from the rule laid down in this Article, but nevertheless it shall not be lawful to effect the sale of any articles forming part of the prizes, and no vessels accompanying prizes shall remain in port for any longer time than that which may be absolutely required for receiving the proper supplies.

"Article III. Vessels of war belonging to the belligerent Powers, bringing no prizes, will be allowed to enter the ports and waters mentioned in Article I, and to stay therein provided they comply with the regulations laid down in the following sections:—

"Sec. 1. The ships of war of the belligerent Powers shall not commit within the ports and waters of Portugal any acts of hostility against the ships or subjects of any other Power, even of that with which the Power to which they belong shall be at war.

[1] State Papers, LI, 130.
[2] Alabama Claims (U.S.), Vol. IV, p. 167.

"Sec. 2. In the said ports and waters the ships above mentioned shall not increase the number of their crews by enlisting any sailors, whether they be the subjects of the nation to which they belong or of any other country.

"Sec. 3. The said vessels are likewise forbidden to increase within the said ports and waters the number or weight of their guns, as well as to ship any portable arms or warlike stores.

"Sec. 4. The said vessels shall not sail out of port within twenty-four hours reckoned from the time of the departure of any ship of another Power with which that to which they belong shall be at war, unless they obtain a dispensation from the proper authority as to the period above-mentioned, after giving the necessary guarantee that they will not avail themselves of the circumstances to commit any acts of hostility against the enemy's vessel.

"Article IV. It is lawful to carry under the Portuguese flag any articles of lawful trade belonging to the subjects of the belligerent Powers; and it is likewise lawful to ship any articles of lawful trade belonging to Portuguese subjects under the flag of any of the belligerent Powers.

"Sec. 1. All articles which may be considered contraband of war are expressly excluded from the provision laid down in this Article.

"Sec. 2. The provision laid down in this Article is also inapplicable to any ports of the belligerent Powers that may be placed in a state of effective blockade.

"Article V. All Portuguese subjects, as well as all foreigners residing in Portugal and its dominions, are bound to abstain from any acts that may be considered by law to be contrary to the external safety and to the interests of the State in regard to foreign nations."

The Decree of 28 April, 1898, issued in the war between the United States and Spain, is a mere repetition of the above.[1]

Russia.—With the exception of Article CCLIX of the Penal Code, there does not appear to have existed any law or regulation whereby the Government were enabled to prevent the commission of breaches of neutrality committed within Russian territories.

"Article CCLIX. If any Russian subject in time of peace shall by open force attack the inhabitants of a neighbouring State or those of any other foreign country, and shall thereby subject his own country to the danger of a rupture with a friendly Power, or even to an attack by such foreign subjects on the territory of Russia, for such a crime against international law the offender, and all those who participate voluntarily in his enterprise, with a knowledge of its objects and illegality, shall be sentenced to lose all civil rights and be condemned to hard labour in a fortress for a term of eight to ten years."[2]

In the Declaration of Neutrality of 3 May, 1898, in the war between the United States and Spain, the Government, after the

[1] State Papers, Vol. XC, 374.
[2] Parl. Pa., Neut. Law Com. Rep., App. 65.

expression of various amiable figures of speech, enjoins its subjects to observe the duties of neutrality.[1]

Prussia—Up to the Franco-German War there was little legislation, either direct or indirect, dealing with this offence, and nothing whatever prohibiting the building or sale of vessels of war. By section III of the Penal Code, 1851, whoever enlisted or caused to be enlisted a Prussian subject in a foreign military service was liable to the imprisonment of from three months to three years. Under the head of indirect preventative measures against breaches of neutrality, came all those laws which enabled the Government generally to oppose the maturing of acts of violence within its territories.

Upon the outbreak of the American Civil War the Government, by its Proclamation of Neutrality, warned the mercantile classes to abstain from all those enterprises forbidden by the general principle of the Convention and Declaration of Paris, 1856. To those who took letters of marque or who shared in privateering adventures, carried contraband of war or despatches, was denied the protection of the Government.

The equipment of privateers in Prussian ports was declared to be illegal.[2]

Sweden.—By Article VIII of the Ordinance of Neutrality of 8 April, 1854, the subjects of Sweden were forbidden

"d'armer ou d'equiper des navires pour être employés en course contre quelqu'une des Puissance belligérantes, leurs sujets et propriétés; ou de prendre part à l'équipment de navires ayant une pareille destination. Il leur est egalement défendu de prendre service à bord de corsaires étrangers."[3]

In the war between Russia and Turkey, the Ordinance of Neutrality of 11 May, 1877, merely enjoined conformity to the previous ordinance, adding *lead* to the list of articles contraband of war.[4]

By the Ordinance of Neutrality of 25 April, 1898, in the war between the United States and Spain, it was declared that instead of the rescript affixed to a note to section 1 of the Ordinance of 1854, the Decrees of 27 November, 1891, 31 December, 1891, and 24 February, 1893, should be substituted.[5]

Denmark.—In the "Rules for the Guidance of Merchants and Shipmasters in the time of Hostilities between Maritime Powers," issued 20 May, 1803, the subjects of Denmark were prohibited from carrying contraband of war destined for belligerent use. In the list of contraband articles, ships are not enumerated.[6] By

[1] State Papers, Vol. XC, 377.
[2] *Ibid.*, LI, 70.
[3] *Ibid.*, Vol. XLVI, p. 833.
[4] *Ibid.*, Vol. LXVIII, p. 490.
[5] *Ibid.*, XC, p. 378.
[6] Article 13.

Article XVI all subjects are forbidden to serve on board privateers, to arm or to be interested in arming such vessels, or to allow their ships to be used for the transport of troops, weapons, or contraband of war of any description. By the Royal Resolutions of 20 May, 1823, privateers were denied entrance into the Danish ports except in case of distress, and they were not permitted to send in their prizes for sale or any other purpose. They were also forbidden to unload their prizes in Danish waters, or to sell their cargoes in Danish ports.[1]

By Article LXXVI of the Penal Code of 1866, enlistment of subjects in the service of a foreign Power at peace with Denmark, or the engagement or service of subjects, is punishable with imprisonment with or without hard labour.

The procuring of arms, vessels, or munitions of war are also prohibited.

By the Proclamation of Neutrality of 18 May, 1877, in the war between Russia and Turkey, the resolutions of the Declaration of Paris, 1856, were adopted, and to the list of contraband mentioned in the Rules of 1803 were added, "all such manufactured articles as could be directly used in warfare."

The Declarations and Law of the Government of Denmark of 29 April, 1898, in the war between the United States and Spain, contains in the "Provisional Law forbidding Danish subjects to assist belligerent Powers," the following provisions:—

"Sec. 1. In the case of war breaking out in which the Danish State is neutral, its subjects are forbidden:—

(1) To take service in any capacity in the army of the belligerent Powers, or on board the ships of their Government in which is comprised piloting their war or transport ships outside Danish pilotage waters, or except in cases of danger at sea to assist them in sailing.

(2) *To build or rebuild, sell, or in any way hand over*, indirectly or directly, to any of the belligerent Powers, ships which appear to be or are presumed to be intended for use in war, or to assist in any way in fitting out or accommodating such ships for war purposes either on or from Danish territory.

(3) To assist either on or from Danish territory any of the belligerent Powers in their warlike operations as well as to supply their ships with objects which can be classed as contraband of war, or to undertake work for any of the belligerent Powers which may appear to increase their ships' armaments or to give them greater strength or mobility for war.

(4) To transport contraband of war for any of the belligerent Powers, or to hire or charter the ships which appear to be intended or could be turned to such usage.

[1] State Papers, Vol. LXVIII, p. 615.

(5) To openly solicit admission into the land or sea forces of the belligerent Powers, or in any way to give them help in war as well as openly to offer to raise a State loan for either of the belligerents if the Government has issued a special prohibition against it."

Austria.—Prior to 1867 there existed no law in Austria applying to violations of neutrality by Austrian subjects, apart from the principles which formed the basis of the Declaration of Paris, which had been rendered part of the law of the land. By the Proclamation of Neutrality of 28 May, 1854, the acceptance or employment of letters of marque and any participation in privateering was prohibited. Foreign privateers were, except in case of distress, denied entrance into Austrian ports, and vessels under Austrian colours were forbidden to carry troops for belligerents or to import into belligerent ports contraband of war. Enemy's goods in neutral ships and neutral goods in enemy's ships, except contraband of war and enemy's despatches, were declared free, in accordance with the assent of the belligerent powers officially expressed.

Belligerent prizes might be admitted into the port of Trieste subject to the control and judicial authority of the local administration.

These provisions were repeated in the Proclamation of Neutrality of 11 May, 1877, on the occasion of the Russo-Turkish war.

By Article LXXVII of the Penal Code, the procuring of arms, vessels, or munitions of war for the service of a foreign Power is prohibited.

Bavaria.—By Article XXXVI of the Penal Code, the procuring of arms, vessels, or munitions of war is prohibited.

Brazil.—Upon the outbreak of the American Civil War, the only municipal law relating to breach of neutrality was contained in Article LXXXIII of the Penal Code. The offence consisted in "committing, without the order or the authorization of the Government, hostile acts against the subjects of another nation so as to endanger peace or provoke reprisals."

By an Imperial Circular of 1 August, 1861, the presidents of the provinces were instructed as follows:—

"The Confederate States have no recognized existence; but having constituted a distinct Government *de facto*, the Imperial Government cannot consider their naval armaments as acts of piracy nor refuse them, with the necessary restrictions, the character of belligerents which they have assumed.

"In conformity with this, Brazilian subjects are to abstain from all participation and aid in favour of one of the belligerents, and they must not take part in any acts which can be considered as hostile to one of the two parties and contrary to the obligations of neutrality.

"The exportation of warlike articles from the ports of the Empire for the new Confederate States is absolutely prohibited, whether it is intended to be done under the Brazilian flag or that of another nation.

"The same trade in contraband of war must be forbidden to Brazilian ships, although they may be destined for the ports subject to the Government of the North American Union.

"No ship with the flag of one of the belligerents, and which may be employed in this war or intended for it, can be provisioned, equipped, or armed in the ports of the Empire; the furnishing of victuals and naval provisions indispensable for the continuation of the voyage not being included in this prohibition.

"No ship of war or privateer shall be allowed to enter and remain with prizes in our ports or bays more than twenty-four hours, except in case of forced arrival, and they shall in no way be allowed to dispose of the said prizes or of the objects coming from them."

These provisions were repeated in the President's Circular of 29 April, 1898, in the war between the United States and Spain. It was further provided by Article XIII that belligerents should not be allowed in Brazilian ports—

(1) To augment their crews by enlisting sailors of any nation whatever, including their own countrymen.

(2) To increase the numbers and calibre of their artillery or perfect it in any way, or purchase or take on board small arms and ammunitions of war.[1]

Japan.—By an Imperial Ordinance, No. 86, contained in the Proclamation of Neutrality of 30 April, 1898, in the war between the United States and Spain, all Japanese subjects and foreigners within the dominions were forbidden—

(1) To accept from either of the belligerents a letter of marque or commission for capturing merchant vessels by means of privateers.

(2) To take service in the army or navy, or to engage in any military operations of either of the belligerents, or to enlist as a member of the crew, or to take service on board of a vessel used for warlike purposes or privateering by either of the belligerents.

(3) To make contracts with other persons or to send such persons beyond the dominions of the empire, with the object of enabling such persons to enter into the military or naval service of either of the belligerents, or for the purpose of enabling them to enlist as members of the crews, or to accept service on board ships used for warlike purposes or privateers.

(4) To sell, purchase, charter, arm or equip ships with the object of supplying them to either of the belligerents for use in war or

[1] State Papers, Vol. XC, 354.

privateering; or to assist in any such sale, purchase, chartering, arming or equipping.

(5) To supply arms, ammunition, or other material of direct use in the hostilities to the men-of-war and other ships used for war-like purposes, or to privateers belonging to either of the belligerents.[1]

United States.—The law relating to foreign enlistment is now contained in Title LXVII of the Revised Statutes, 1873–4, and is entitled "Neutrality."[2] The Act of 1818 is reproduced without any material alteration, although one might have expected after the violent attack at the Geneva Arbitration made by the American representatives upon the English statute that advantage would have been taken to at any rate have brought the Act up to the same standard as the English statute by making the offence of fitting-out and arming disjunctive instead of allowing it to remain conjunctive.

This Title embraces eleven sections, from 5281 to 5291 inclusive. Section 5281 prohibits the acceptance of commissions from a foreign Power by citizens of the United States within its territory to serve against any sovereign with whom the Union is at peace. It corresponds to section 1 of the Act of 1818.

Section 5282 prohibits any person from enlisting in the United States as a soldier or sailor in the service of any foreign Power, and from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting. It corresponds to section 2 of the Act of 1818.

Section 5283 prohibits any person from fitting-out *and* arming or attempting to fit out *and* arm or procuring to be fitted-out *and* armed or knowingly to be concerned in the furnishing, fitting-out, *or* arming of any vessel with intent that such vessel should be employed in the service of any foreign State, to cruise against the subjects or property of any other foreign State with which the United States is at peace. It corresponds with section 3 of the Act of 1818.

Section 5284 prohibits citizens from similarly fitting-out and arming vessels outside the limits of the United States with intent to cruise against citizens or property of the United States. It corresponds with section 4 of the Act of 1818.

Section 5285 prohibits the augmentation of the force of foreign vessels of war serving against a friendly State. It corresponds with section 5 of the Act of 1818.

Section 5286 prohibits the initiation, provision, or preparation

[1] State Papers, Vol. C, 366.
[2] 1 Revised Statutes, United States, p. 1029.

of any military expedition or enterprise against the territory or dominions of any foreign sovereign. It corresponds with section 5 of the Act of 1794 and section 6 of the Act of 1818.

Sections 5287 to 5290 provide for the enforcement of the preceding sections, and correspond with sections 8, 9, 10, and 11 respectively of the Act of 1818.

Section 5291 provides that the provisions set forth shall not be continued to prevent the enlistment of certain foreign citizens who happen to be within the jurisdiction of the United States. It corresponds with sections 2 and 13 of the Act of 1818.

The United States *v.* Rand[1] was a prosecution of Rand and Pender, captain and mate of the "Tropic," for violation of section 5286 of the Revised Statutes. On 15 March, 1883, the "Tropic" sailed from Philadelphia with a cargo of arms and military stores to Inagua, where she embarked a large number of men, who put on uniforms, drilled, and prepared for active military service. She then proceeded to Miragoane, Hayti, where the men landed and captured the town from the Haytian Government. During the attack the vessel rode outside the harbour, and immediately after the capture of the town ran in and landed her stores. On the return of the ship to the United States the defendants were arrested and put on their trial.

In charging the jury, Butler, J., said:—

"That the attack upon and capture of Miragoane was the result of a *military expedition* is clear. Was it begun or set on foot within the territory of the United States, to be carried on from thence, or the means here provided for such expedition? As we have seen, the arms, military stores, and means for the transportation of them and of the men subsequently taken on board were here provided and started out. That the men were not taken on board until the vessel reached Inagua is not in the judgment of the Court material. The expedition, as it left this port, viewed in the light of subsequent events (the shipping of the men at Inagua and the attack upon Miragoane) was in the judgment of the Court a military enterprise, within the terms and spirit of the statute—a military enterprise begun or set on foot within the territory of the United States, to be carried on from thence."

The only question remaining was the question of interest. The defendants were found to be connected with the expedition, with knowledge of the circumstances and with designs to promote it.

In the United States *v.* the "Mary N. Hogan"[2] it was held that an expedition organized and despatched from the ports of the United States in separate parts, to be united at a common rendezvous on the high seas, and to proceed thence to Hayti in completion of the original hostile purpose against a friendly

[1] 17 Fed. Rep., 142 (1883).
[2] 18 Fed. Rep., 529 (1883).

Power, was within the prohibition of section 5283 of the Revised Statutes.

The "Mary N. Hogan" was on 20 July, 1883, seized on the ground of being concerned in an illegal expedition. At the time of her seizure there were no arms, ammunition, or warlike appliances on board, and she was wholly unadapted for effective naval operations against any considerable organized opposition. But on the other hand, it was proved that the vessel was purchased in New York by persons interested in the Haytian insurrection, and there fitted out for sea, and that simultaneously a large quantity of arms and ammunition were bought by the same persons and despatched on board the schooner "Erwin" with instructions and preconcerted signals for transferring them near Hampton Roads to the "Mary N. Hogan."

The evidence, said Brown, J., left no doubt in his mind that the vessel was fitted out for the purpose of receiving near the Hampton Roads the $7000 worth of arms and ammunition which had been despatched by the "Erwin" to that rendezvous two days before, and of proceeding thence to Hayti in aid of the insurgents there in the various ways for which she was suited.

The sequel to this case was the United States *v.* Two Hundred and Fourteen Boxes of Arms, Ammunition, and Munitions of War and United States *v.* One Hundred and Forty Kegs of Gunpowder.[1] The "Mary N. Hogan" having failed to meet the "Erwin," the latter proceeded on her voyage to Richmond, where she discharged her legitimate cargo, but was arrested with the munitions of war under section 5283 of the Revised Statutes. The goods were condemned in both cases.

The "Carondelet"[2] was seized on 6 February, 1889, and charged with violation of section 5283 of the Revised Statutes, inasmuch as she was loaded with cannon, arms, and ammunition and other material of war with intent to enter into the service of a certain district and people of Hayti, to wit, certain rebels in insurrection against the organized and recognized Government of Hayti, and to commit hostilities against the subjects, citizens, and property of that Republic, and fitted out and armed within this district with that intent.

This vessel had been chartered by the Consul of the Dominican Government to carry a cargo of arms to Samana in the Dominican Republic, deliverable as per bill of lading to the representatives of that Government. The allegation was that the vessel and arms were designed to aid Hippolyte as against Legitime in the struggle for supremacy in Hayti.

[1] 20 Fed. Rep., 50 (1884).
[2] 37 Fed. Rep., 799 (1889).

"This," said Brown, J., "was not a case even of insurrection against a recognized Power. In August, 1888, the existing Government in Hayti was overthrown, the President being deposed and banished. As stated in President Cleveland's message of 3 December, 1888, the country has since then been in a state of anarchy, in which there is a struggle of warring factions, neither of which is recognized by the United States as constituting any responsible Government. Section 5283 is designed in general to secure our neutrality between belligerent Powers. But there can be no obligation of neutrality except towards some recognized State and Power *de jure* or *de facto*. Neutrality presupposes at least two belligerents, and as respects any recognition of belligerency, i.e. of belligerent rights, the judiciary must follow the executive. To fall within the statute, the vessel must be intended to be employed in the service of one foreign prince, State, colony, district, or people to cruize or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace. The United States can hardly be said to be 'at peace,' in the sense of the statute, with a faction which they are unwilling to recognize as a Government; nor could the cruizing or committing hostilities against such a mere faction well be said to be committing hostilities against the 'subjects, citizens, or property of a district or people' within the meaning of the statute. So, on the other hand, a vessel in entering the service of the opposite faction of Hippolyte could hardly be said to enter the service of a foreign 'prince, or State, or of a colony, district, or people' unless our Government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done. In view of the President's message, neither the party of Hippolyte nor that of Legitime constitutes the 'Republic of Hayti,' or represents the Government or a district or the people of Hayti."

Moreover, the learned judge was satisfied upon the evidence that the "Carondelet" was designed only to transport arms to the order of the Dominican Government in the ordinary course of their trade.

"When it appears," said Mr. Justice Brown, "that the transaction is an official one in behalf of an independent Government with which our own Government is at peace, and that Government is the *bona fide* consignee at one of its own ports, it must require a very clear case to justify arrest and condemnation, even if it could be lawfully done at all, whatever the ulterior purpose of that Government might be. It is no part of the design of our statute to enforce neutrality upon other States. There is no need of any statute of neutrality for such a purpose nor appropriateness in an application of it, since every recognized Power is presumed to be responsible for what it does and for what it permits to be done within its own jurisdiction. *When the arming is on the high seas through another vessel, proof that both were despatched from our ports as parts of a concerted scheme made here* is justly held proof of 'an attempt within the limits of our jurisdiction to fit out and arm' the vessel with intent to commit hostilities, and hence within the statute. That construction is necessary to avoid easy and manifest evasions of neutrality; for arming on the high seas is not an act within the limits of any other jurisdiction. No other State has any power, control, or responsibility in the matter; but our own ports become

in such cases the real base of hostile operations. It is otherwise when the arming is designed to be in a foreign port, and under the observation, the control, and the responsibility of another Government. That is not an attempt here to fit out and arm the vessel, but only an attempt to send her to a foreign port for arming. The statute does not include that, and ought not to be extended to such a case. There is no precedent and no sufficient reason for it. Still more should a *bona fide* delivery to an independent Government be deemed to end the adventure so far as our merchants are concerned. Subsequent acts under the authority or permission of that Government are too remote for the operation of our statute. And when such a *bona fide* delivery alone is the design of the owner and shipper, the adventure is commercial only, and there is no violation of section 5283, whether the articles are contraband or the vessels are armed or unarmed."

The "Conserva"[1] was libelled for a violation of the neutrality laws under section 5283 of the Revised Statutes. It was held by Judge Benedict that the fact must be established that the Government against which it was alleged that the vessel was intended to commit hostilities had been recognized by the United States, and that the words of the section did not include factions engaged in insurrection who were not so recognized as belligerents.

"This prosecution," said the learned judge, "must fall for want of proof that either Hippolyte or Legitime has been recognized by our own Government as belligerent Powers. In the absence of proof of that fact, the fitting out of a vessel with intent to enter the service of one to commit hostilities against the other is not brought within the scope of the statute."

In the United States *v.* Trumbull,[2] Trumbull and Burt were indicted for violation of the neutrality laws under sections 5283, 5285, and 5286 of the Revised Statutes.

In January, 1891, the "Itata," a merchant vessel, was captured at Valparaiso, Chile, by the "Congressional Party," which was engaged in attempting to overthrow the Government of Chile, of which Balmaceda was head. The "Itata" was converted into a transport, armed with four small cannon, and despatched to San Francisco for arms and munitions of war. She was accompanied by the Congressional warship "Esmeralda," and at one of the Chilian ports took on board some soldiers with their arms. At San Diego the "Itata" hauled down her jack and pennant; the cannon and the soldiers' arms were stowed in the hold, the soldiers removed their uniforms and appeared in civilian dress, and coal and provisions were laid in. Meanwhile, the arms and ammunition were brought from San Francisco to Catalina Island to meet the "Itata." Suspicions having been aroused, the latter was ordered

[1] 38 Fed. Rep., 431 (1889).
[2] 48 Fed. Rep., 99 (1891.)

to be detained, but on 6 May, having learned that the arms were waiting, the "Itata" steamed out of San Diego without obtaining clearance papers and with the marshal's officer on board, and on the 9th the arms and ammunition were transferred to her near San Clement's Island and carried to Chile.

"There is nothing in the evidence," said Ross, J., "tending to show that any of the arms or ammunition were intended for use by the 'Itata.' On the contrary, the whole case shows that the defendants caused them to be put on board of her with the intention that she should transport them to Chile for the use of the insurrectionary party there. This does not constitute the fitting out, arming, or furnishing of the 'Itata' with intent that she should be employed to cruise or commit hostilities in the service of the insurrectionary party against the then Government of Chile. In principle the case is, I think, like that of the 'Florida.'"

The case does not therefore fall within section 5283. Neither does it fall within sections 5285 and 5286. Counsel for the United States had admitted that the case did not come within section 5285.

"If the evidence," said the learned judge, "shows that in this case there ever was any military expedition begun or set on foot or provided or prepared for within the sense of this statute, it was begun, set on foot, provided, and prepared for in Chile, and was to be carried on from Chile and not from the United States. But I think it perfectly clear that the sending of a ship from Chile to the United States, to take on board arms and ammunition purchased in this country and carry them back to Chile is not the beginning, setting on foot, providing, or preparing the means for any military expedition or enterprise within the meaning of section 5286."

Hendricks *v.* Gonzalez[1] was an action by Gonzalez against Hendricks, collector of the port of New York, to recover damages for detaining the steamer "South Portland," of which the plaintiff was charterer. Upon the information of the Minister of Venezuela that the vessel was to leave with arms for the rebels in that country, the collector, acting upon the instructions of the Secretary of the United States Treasury, had detained the vessel. It appeared that the "South Portland" was an ordinary merchantman; that her cargo consisted entirely of arms and munitions of war, that the charterer was in sympathy with the rebels, and that she was bound for a port near the seat of hostilities, but that she was not at the time manned or in a state of preparation for warlike operations.

It was held first, that the collector was not justified in refusing a clearance, although he acted under instructions from the Secretary of the Treasury, unless such instructions were authorized by law. Secondly, that the vessel was not "manifestly built for

[1] 67 Fed. Rep., 351 (1895).

warlike purposes," was not manned for warlike operations, and was not intended "to cruise or commit hostilities," or engage in naval warfare against the subjects or property of a friendly Power.

"It is not enough," said Wallace, J., "that it was the purpose of her intended voyage to transport arms and munitions of war for the use of the insurrectionary party in Venezuela."

During the disturbances in Cuba in 1895, a Proclamation of Neutrality was published 12 June warning citizens of the United States from accepting or exercising commissions for warlike service against the Spanish Government by enlistment, or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out any armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States.[1]

And in his annual message of 2 December, the President said:—

"Cuba is again gravely disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbours, yet the plain duty of their Government is to observe in good faith the recognized obligations of international relationship. The performance of such duty should not be made more difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relation to friendly sovereign States. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavours thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly

[1] State Papers, LXXXVII, 733.

fulfil every international obligation, yet it is to be earnestly hoped on every ground that the devastation of armed conflict may speedily be stayed and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

A military expedition or enterprise within the meaning of section 5286 of the Revised Statutes, was defined in Wiborg *v.* United States[1] by the Supreme Court as a combination of men organized in the United States for the purpose of proceeding to and making war upon a foreign Government with which the United States were at peace, and provided with arms to be used for such purpose.

In this case a body of men went on board a tug loaded with arms and were carried by it thirty or forty miles out to sea, where they met a steamer by prior arrangement, boarded her with the arms, opened the boxes and distributed the arms among themselves, drilled to some extent, and were apparently officered. Then, as prearranged, they effected an armed landing on the coast of Cuba.

"The men and the arms," said Fuller, C.J., "came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only 'capable of proximate combination into an organized whole,'[2] but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war by their own efforts. It may be that they intended to separate when they reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary. From that evidence the jury had a right to find that this was a military expedition or enterprise under the statute, and we think that the Court properly instructed them on the subject.

In the United States *v.* Pena,[3] the evidence showed that on 29 August, 1895, the defendants assembled in Wilmington, and under cover of night went on board the tug-boat "Taurus" with twenty-seven boxes of freight, some of which had been brought from Philadelphia and others from Wilmington. The captain was ordered by De Soto, one of the defendants, to go out into the Delaware river, and to steam up and down between the mouth of the Christiania and Gordon Heights until he should hear the signal of three whistles from a steamship outward

[1] 163 U.S., 632; 16 Sup. Ct. Rep., 1127, 1197 (1895).

[2] Hall's "Rights and Duties of Neutrals," sec. 22. "In the case of an expedition being organized in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. . . . On the other hand, the uncombined elements of an expedition may leave a neutral State in company with one another provided they are incapable of proximate combination into an organized whole."

[3] 69 Fed. Rep., 983 (1895).

bound, when he was to run alongside and tranship the boxes. No steamship appearing, at the request of the defendants some of them with their boxes of freight and personal effects were landed at Pennsgrove, in New Jersey. But as the "Taurus" was leaving the pier, the "Meteor," with the marshal on board, appeared. The boxes were seized, replaced on the "Taurus," the defendants arrested and charged under section 5286 of the Revised Statutes. It was held that a military expedition or enterprise, within the statute, means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped, or ready to be officered and equipped, for active hostilities; and preparing the means for such an organization would come within the statute, but to complete the offence it must be shown that the expedition was to be carried on from thence against the dominions or territory of a foreign State; and the mere fact that persons of the same nationality as those carrying on an insurrection in a foreign State, with which such persons are believed to be in sympathy, have gathered arms and prepared to ship them secretly and under suspicious circumstances, is not alone sufficient for the conviction of such persons under the statute, without proof that such persons have set on foot a military expedition within the United States against such foreign State.

In the United States *v.* Hughes,[1] it appears that the defendant was captain of the "Laurada," which left New York on 21 October, 1895, and after passing Sandy Hook was joined by two tugs, bringing her thirty-five men, some boxes, and three small boats. Shortly after these had come aboard, the boxes were opened, and guns, pistols, and machettes served out, and the "Laurada" proceeded on her voyage, during which the men were drilled. On approaching Cuba her lights were extinguished, and the men landed with their arms in the boats. It was held that there was probable cause to believe that Hughes had violated the statute by providing or preparing the means for a military expedition to be carried on against a foreign State, and that he must be committed for trial.

In the United States *v.* Hart,[2] the defendants were charged with violating the neutrality laws, by beginning, setting on foot or preparing for, a military expedition or enterprise from New York against Spain, in aid of the Cuban insurgents. The "Bermuda" was arrested just before she was about to sail with sixty men on board, who were neither armed, equipped, nor officered. There was no proof, except the doubtful testimony of one witness

[1] 70 Fed. Rep., 972 (1895).
[2] 74 Fed. Rep., 724 (April, 1896).

belonging to the party, of any intent on the part of the men to go to Cuba and join the army there. There were no arms on board.

The jury were instructed (1) that it was no offence for individuals, singly or in company and in any way they chose, to go abroad for the purpose of enlisting in a foreign army, provided they did not in the United States enlist in or set on foot or prepare any military expedition or enterprise; (2) that such an expedition or enterprise to come within section 5286 as one "carried on from this country" must consist of some body of persons designing to act together in a military way, and possess at the start from this country some element of a military character beyond the mere intent to enlist individually after arrival in Cuba; (3) that it is not necessary that it should possess all the elements of a military body at the start, but it is sufficient if there was a combination of men for that purpose, with the intent that it should become so before reaching the scene of action; (4) that it is not unlawful to transport peaceably and by an unarmed vessel a body of men as individuals to Cuba who wish to enlist there, and such transportation does not constitute a providing of the means for a military expedition or enterprise unless there is some enlistment or combination or agreement of the men to act in some way as a military body, or the use of some military force is contemplated, if necessary, in order to reach the insurgent army.

The United States *v.* O'Brien[1] formed part of the same offence as the last case. O'Brien was the captain of the "Bermuda," Murphy the mate, and Nunez the supercargo. These defendants were charged with violating the neutrality laws by taking part in the preparation and transportation of a hostile military expedition against Spain in the island of Cuba under sections 5282 and 5286 of the Revised Statutes.

The charge to the jury by the District Judge laid down the same principles as those relied upon by him in the last case. He particularly emphasized the point that mystery and secrecy in the preparation and conduct of such enterprises—even the taking of a false oath by the master in connexion with the clearance papers—were not conclusive of the illegality of the enterprise, inasmuch as the transportation of passengers and merchandise in a perfectly lawful way would be accompanied with danger. It was, therefore, only the part of prudence to take all the means of secrecy possible to prevent the anticipation and thwarting of the enterprise by the foreign Power affected. Such precautions are as consistent with legality as illegality, and the mere fact of secrecy or mystery which might surround such enterprises does not of itself give them an unlawful character.

[1] 75 Fed. Rep., 900 (July, 1896).

The jury disagreed upon the facts.

By the President's Proclamation of Neutrality of 27 July, 1896, the citizens of the United States were again warned not to act in contravention of the neutrality laws of the United States, and their attention was expressly called to the recent judicial interpretation of "a military expedition or enterprise."[1] But there was no recognition of any responsible insurgent Government. On the contrary, the President in his message of 7 December said:—

"As the contest has gone on, the pretence that civil government exists on the island, except so far as Spain is able to maintain it, has been practically abandoned. Spain does keep on foot such a government more or less imperfectly in the large towns and their immediate suburbs. But that exception being made, the entire country is either given over to anarchy or is subject to the military occupation of one or the other party. It is reported, indeed, on reliable authority, that at the demand of the Commander-in-Chief of the insurgent army, the putative Cuban Government has now given up all attempt to exercise its functions, leaving that Government confessedly (but there is the best reason for supposing it always to have been in fact) a Government merely on paper. . . . But imperfect and restricted as the Spanish government of the island may be, no other exists there—unless the will of the military officer in temporary command of a particular district can be dignified as a species of government."

The steamer "Three Friends"[2] was seized 7 November, 1896, and libelled with being on 23 May, 1896, furnished, fitted out, and armed, with intent to be employed in the service of certain Cuban insurgents, to cruise and commit hostilities against the subjects, citizens, and property of the King of Spain, in the island of Cuba, with whom the United States are and were at that date at peace, under section 5283 of the Revised Statutes. The case was held by the District Judge not to come within the Statute, since it was not alleged that the vessel had been fitted out with intent to be employed in the service of a "people" *recognized* as such by the political power of the United States.

In delivering the judgment of the Supreme Court, Chief Justice Fuller defined neutrality as consisting of—

"abstinence from any participation in a public or private or civil war, and in impartiality of conduct towards both parties, but the maintenance unbroken of peaceful relations between two Powers when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, which good faith towards friendly nations requires their prevention."

[1] State Papers, Vol. LXXXVIII, 845.
[2] 166 United States Rep., 1 (1897).

Upon the question of recognition, the learned judge, referring to the language of the Statute, observed: "But there is nothing in all this to indicate that the words 'colony, district or people' had reference solely to communities whose belligerency had been recognized, and the history of the times . . . does not sustain the view that insurgent districts or bodies unrecognized as belligerents were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words 'district or people' should be attributed to the intention to include such bodies as, for instance, the so-called Oriental Republic of Artigas and the Governments of Pétion and Christophe, whose attitude had been passed by the Courts of New York more than a year before in Gelston *v.* Hoyt,[1] which was then pending in this Court on a writ of error." There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred to in saying in the "Gran Para,"[2] that the Act of 1817

"adapts the previous laws to the actual situation of the world. At all events, Congress imposed no limitations on the words 'colony, district or people,' by requiring political recognition.

"Of course, a political community whose independence has been recognized is a 'State' under the Act; and if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words 'colony, district or people,' instead of being limited to a political community which has been recognized as belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country in the effort to achieve independence, although recognition of belligerency has not been accorded.

"And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent State, concedes to the Government recognized rights and imposes upon it the obligations of an independent State in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a State in the sense of the statute.

"Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question."

After referring to Gelston *v.* Hoyt,[3] the "Estrella,"[4] the "Nueva Anna and Liebre,"[5] the "Gran Para,"[6] in the latter of which cases Chief Justice Marshall referred to Buenos Ayres as a

[1] 13 Johns., 141, 561.
[2] 7 Wheat., 471, 489.
[3] 3 Wheat, 246.
[4] 4 Wheat, 298.
[5] 6 Wheat, 193.
[6] 7 Wheat, 471.

State within the meaning of the Act of 1794, the learned judge continued :—

"Even if the word 'State' as previously employed admitted of a less liberal signification, why should the meaning of the words 'colony, district or people' be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word 'State,' for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or State, though acting in hostility to such prince or State. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the Act is the same before as after the recognition of belligerency, as shown by the instances of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not that of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized Power *de facto*, since such a Power would represent not the territory actually held, but the territory covered by the claim of sovereignty. And the word 'people,' when not used as the equivalent of State or nation, must apply to a body of persons less than a State or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body."

The United States *v.* Quincy[1] was next cited as showing that the word "people," as used in the indictment, was merely descriptive of the Power in whose service the vessel was intended to be employed, and was one of the denominations applied by the Act of a foreign Power. Any obscurity in the word as applied to a recognized Government was ended by the words which followed: "that is to say, in the service of the United Provinces of Rio de la Plata."

Nesbitt *v.* Lushington,[2] continued the learned judge—

"was an action on a policy of insurance in the usual form, and among the perils insured against were 'pirates, river thieves,' and 'arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever.' The vessel with a cargo of corn was driven into a port, and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller.

"Mr. Justice Buller said, 'people' means 'the supreme power'; 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, theives'; then having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and *people* of what nation, condition, or quality soever.' Those words, therefore, must apply to nations in their collective capacity.

[1] 6 Pet., 445. [2] 4 T.R., 783.

"As remarked in the brief of Messrs. Richard H. Dana, jun., & Horace Gray, jun., filed by Mr. Cushing in Mauran *v.* Insurance Co.,[1] the words 'were doubtless originally inserted with the view of enumerating all possible forms of government—monarchical, aristocratical, and democratic.'"

In pointing out the substantial correspondence of the seventh section of the Act of George III with the third section of the American Act of 1818, the learned judge said that the terms of the English statute were considerably broader and left less to construction.

After citing Lord Cairns's observations in the "Salvador,"[2] the Chief Justice said:—

"We regard these observations as entirely apposite, and while the word 'people' may mean the entire body of the inhabitants of a State, or the State or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connexion with the words 'colony' and 'district,' *covers in our judgment any insurrectionary 'body of people, acting together, understanding and conducting hostilities, although its belligerency has not been recognized.'* Nor is this view otherwise than confirmed by the use of the same words in the succeeding part of the sentence, for they are there employed in another connexion—that is, in relation to the cruising or the commission of hostilities, 'against the subjects, citizens, or property of any foreign prince, or State, or of any colony, district, or people with whom the United States are at peace'; and as thus used are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities by sea or land were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

"Any other conclusion rests on the unreasonable assumption that the Act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war may be the consequence of failure in the performance of obligations towards a friendly Power; while, on the other hand, the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

"No intention to circumscribe the means of avoiding the case by imposing as a condition the acceptance of the contingencies of the other can be imputed.

"Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing Power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates.[3]

"But it belongs to the political department to determine when belligirency shall be recognized, and its action must be accepted according to the terms and intention expressed.

[1] 6 Wall., 1. [2] L.R., 3 P.C., 218; *ante*, p. 442.
[3] The "Ambrose Light," 25 Fed. Rep. 408; 3 Whart., "Dig." Int. Law, sec. 381.

"The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent Power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred."

In support of this statement the learned judge cited the Proclamations and Messages of the President of 1895 and 1896:—

"We are thus," he continued, "judicially informed of the existence of an actual conflict of arms in resistance to the authority of a Government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the Act in question is applicable.

"We see no justification for importing into section 5283, words which it does not contain, and *which would make its operation depend upon the recognition of belligerency;* and the libel might have been drawn with greater precision. We are of opinion that it should not have been dismissed."

Upon the question of whether a vessel ought to be released before hearing upon bond or stipulation, the Court found that, although there was a discretion under rule 11 of section 917 of the Revised Statues, the rule should not be applied when the object of the suit was not the enforcement of any money demand nor to secure any payment of damages, but to take possession of and forfeit the vessel herself, in order to prevent her departure upon an unlawful expedition in violation of the neutrality laws of the United States. In the "Mary N. Hogan,"[1] Judge Bacon said:—

"It is clearly not the intention of section 5283, in imposing forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly Power, which might entail a hundredfold greater liabilities on the part of the Government. No unnecessary interpretation of the rules should be adopted which would permit that result; and yet such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of section 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture of the vessel herself. The Government is, therefore, entitled to retain her in custody, and rule 11 cannot be properly applied to such a case."[2]

Section 5283 came under consideration in the case of the "Laurada,"[3] when it was held that the intent must be formed within the limits of the United States.

[1] 17 Fed. Rep., 813; *ante*, p. 484.

[2] See also SS., 938, 941 Rev. Statutes; The "Alligator," 1 Gall. 145 (1812); the "Struggle," 1 Gall. 476 (1813), and the United States *v.* Ames, 99 U.S. Rep., 35.

[3] 98 Fed. Rep., 983 (1900).

"To render the acts enumerated in this section unlawful," it was said, "it is requisite that they should be done with intent that the vessel should be employed to cruise or to commit hostilities, and that intention must be formed within the limits of the United States. There is no evidence whatever from which it could be inferred that at the time the 'Laurada' left this country an intent to employ her for either of these purposes existed, and it is not necessary to decide whether the landing by her of the expedition on the shore of Cuba was or was not a hostile act, for this was done in pursuance of an intent which was not formed until after the original purpose had been executed; and the theory under which a vessel afloat is, for some purposes, identified with the country to which it belongs, cannot be so applied as to expand the plain and ordinary meaning of the phrase 'within the limits of the United States' as it is used in this statute."

Ship's Papers.—Where the ship's papers (1) are false, or (2) are concealed, spoiled, or destroyed with a view to deceive, such ship may be captured and brought in for adjudication.

False papers: False or double papers invariably constitute a sufficient justification for bringing a vessel in for adjudication, but the practice as to condemnation varies.

In the case of the "Phœnix,"[1] the ship and cargo were ostensibly bound from Guadeloupe to Altona, but were found by the Court to be engaged in the colonial trade between the colony and the mother-country of the enemy. In condemning the ship and cargo, Sir William Scott declared that he had not a doubt that this was a voyage originally to Bordeaux under a false and colourable destination, and that there never was any intention of going to Altona.

But the possession of false or double papers does not necessarily involve confiscation of ship or cargo.

"The use of false papers," says Mr. Duer, "although in all cases morally wrong, is not in all cases a subject of legal animadversion in a court of prize. Such a court has no right to consider the use of papers as criminal, where the sole object is to evade the municipal regulations of a foreign country or to avoid a capture by the opposite belligerent. The falsity is only noxious where it certainly appears, or is reasonably presumed that the papers were framed with an express view *to deceive the belligerent by whom the capture is made*, so that, if admitted as genuine, they would operate as a fraud on the rights of the captors. It is not sufficient that the papers disclose the most disgusting preparations of fraud in relation to a different voyage or transaction. The fraud must certainly or probably relate to the voyage or transaction which is the immediate subject of investigation."[2]

The "Eliza and Katy"[3] was the case of a ship under American colours on a voyage from Philadelphia to Rotterdam. She was

[1] 3 Rob., 186 (1800).
[2] "On Insurance," Vol. I, p. 738.
[3] 6 Rob., 185.

captured and brought in by the privateer "Polecat," but after having been restored by consent, was proceeding on her voyage to Rotterdam with a sentence of restitution on board when she was seized by H.M.S. "Ariadne" and brought in for adjudication. In pronouncing a decree of restitution of the ship and cargo, Sir William Scott declared that although the papers disclosed the most disgusting preparations of fraud, and although the owners of the property had been detected in the meditation of fraud, yet since the fraud was not directed to the present voyage but to some future transaction, there was no ground upon which he could pronounce a sentence of condemnation.

But, on the other hand, taking all the circumstances into consideration—the conduct of the parties—the fact that every person of any authority connected with the ship and cargo—the master, the supercargo, and the owners—were implicated in the same intention of concerting fraud against the belligerent rights of Great Britain, the learned judge mulcted the claimants in costs.

The "Eenrom"[1] was the case of a ship taken on a voyage from Batavia to Copenhagen on 27 December, 1798, by an English cruiser. On the outward voyage the "Eenrom" had cleared from Copenhagen to the East Indies with a cargo consisting of articles which by treaty between Great Britain and Denmark were contraband of war. These circumstances, although suspicious, were not allowed by Sir William Scott to affect his judgment. At Batavia a cargo was put on board ostensibly as the property of Messrs. Fabritius and Wever, Danish merchants, who were also ostensibly the owners of the vessel. Upon her capture Messrs. Fabritius and Wever claimed the entire property in the ship, and through Mr. Fabritius, the son and supercargo on board the vessel, half the cargo as their property. But in the invoice the whole cargo was described as the property of Fabritius and Wever. In their evidence the master and the mate described Fabritius and Wever as the entire proprietors, and Mr. Fabritius, the son, as the shipper. The invoice was signed by the latter, but in his evidence he admitted that one moiety of the cargo was shipped by a Mr. Inglehart, a Dutchman, and "he supposed it to have belonged to him or to some person for whom he acted." But Inglehart's name did not appear in a single document. It was objected that the invoice was not a paper of consequence, and that the bill of lading is the document to which reference is usually made. But, declared Sir William Scott, this is both: it is a bill of lading as well as an invoice. Upon this part of the case Sir William had no difficulty in concluding that it had been the

[1] 2 Rob., 1 (1799).

intention of the supercargo to mislead British courts of justice and British cruisers as to the property in the cargo, that his principals were affected by such fraudulent intention, and that their property must consequently be confiscated. The fraud was that of a deliberate interfering in the war, an attempt to mask and withdraw from the rights of a belligerent, the property of his enemy, to the amount of one half of a most valuable cargo.

The following passage from the conclusion of the judgment is highly important as showing the consequences of deceit, not only in this particular case, but in the practice of the Court in extending the privileges of further proof to claimants:—

"With respect to the ship," asked Sir William, "is the property in that so proved as to support a claim for restitution without further proof? If that could be maintained, I might perhaps allow it to be distinguished from the other part of the case. But if further proof is necessary, it comes to this question: Are persons so convicted of an attempt to impose on the Court entitled to the privilege of further proof? The ship was built at Batavia, and has been constantly trading from Batavia. It must have been the property of Dutchmen; and therefore, under any circumstances, a bill of sale would be necessary; and under the particular circumstances which I have pointed out a bill of sale could hardly be deemed sufficient. But a thicker cloud is raised over this part of the case from what appears from a paper in the 'Nancy,'[1] which is signed by Inglehart, and states: 'I shall accompany this with the accounts of the "Eenrom," of which Messrs. Fabritius and Wever are sharers.' It is said that this applies to the cargo only. It may be so: it is a possible explanation. But how can this be proved? It can only be by further proof. Again, there are many passages in which Mr. Inglehart seems to assume great authority over the conduct of the vessel. It is said that this was in consequence of a charter-party, by which he had chartered the vessel. It may be so; but this is a matter of explanation only and of further proof, as it is left at present, on the face of it, very ambiguous. There being the necessity of further proof, have the parties placed themselves in a situation in which they are entitled to a privilege of this kind? It is a rule that I shall uniformly adhere to till I am better instructed, that where a party has been convicted of an attempt to impose on the Court in *the same transaction*, the privilege of further proof shall be denied him as a privilege which is justly forfeited by deception and fraud. I shall therefore pronounce both the ship and cargo subject to condemnation."

The "Calypso"[2] was also a case of an attempt by a neutral to cover enemy's property which was mixed up with his own. The vessel was on an asserted voyage from Cayenne to Hamburg, and was claimed, together with the cargo, for Mr. Beckman and Messrs. Ecchardt & Co. of St. Thomas. The ship's papers

[1] The "Nancy" was under the management of the same parties, and when brought in, it was discovered from her papers that Inglehart was concerned in the cargo of the "Eenrom." Hence the limited claim of Mr. Fabritius and his tardy repentance.

[2] 2 Rob., 154 (1799).

were found by Sir William Scott to be unverified; the pass was not that described by the master. The master being rejected as perjured and the papers being unverified, with respect to the ship it was at the best, said Sir William, a case for further proof independently of any connexion with the cargo.

"But I do not think," he added, "that the Court is limited to this view of the transaction only without considering the circumstances relating to the cargo as they stand connected with the character and employment of the vessel, because the use and occupation of a vessel are extremely proper to be considered; for if the whole of the *res gestæ* shows the parties to have been habitually and throughout this transaction employing the ship in fraudulent purposes, it must very materially affect their claim to further proof respecting the property of the ship. It has been said that false papers will not by the law of this Court necessarily lead to condemnation if the proof of property is clear, and that papers false as to destination will not stand in the way of restitution under the practice of the Admiralty of this country. It has been said also, and truly, that the evidence respecting the cargo does not generally affect the ship; as it may frequently happen that the owners of the cargo will, from lust of gain, put on board false papers without the knowledge or privity of the owners of the ship. But it is a very different case when the ship and cargo belong to the same persons; and although I will not say that false papers would, even in such a case, necessarily lead to the condemnation of the ship, yet when the first case is only a case of further proof, false papers put on board by the common owners of both ship and cargo cannot but very materially affect their claim to that indulgence."

The whole circumstances of this case were full of fraud. The "Calypso" in the first instance cleared from St. Thomas for Surinam, but put into Cayenne, a French colonial port (under stress of mutiny, as it was alleged), and there sold her cargo. Her real destination was held to be Cayenne. From Cayenne she cleared for Hamburg, but put into La Rochelle, where her cargo from Cayenne was sold. Her real destination was held to be La Rochelle. Although stopped and searched by an English frigate, her papers were so artfully drawn that she was released. The return cargo from Cayenne was documented in the bill of lading as the property of Beckman and Ecchardt, although it appeared from some concealed papers eventually produced, that the greatest part belonged to a number of French merchants. On behalf of the claimants it was contended that all the papers should be taken together, and that it was a reasonable rule that in cases where some papers are produced first and others kept back, the latter must be presumed to state the true and exact measure of interest. Whilst allowing that all the papers should be taken together, Sir William refused to admit that concealed papers are to be taken as necessarily containing the truth.

"If such a rule," he declared, "was established as a principle of this Court, it would let in an infinity of fraud, and make it the easiest thing in the world to protect the chief bulk of property in any case by giving up some part upon the pretended disclosures contained in those concealed papers. The more reasonable rule would be that where there is one set of papers admitted to be false and another set coming out of the same hands, that the whole is thrown into a state of uncertainty and doubt."

After refusing the parties the indulgence of proceeding to further proof, Sir William unhesitatingly declared his opinion to be that even if the cargo had been proved in the clearest manner to be neutral property, yet

"if it was proved that the ship was going from the mother-country of the enemy to their colony under false papers and a false mask and coming back again to the mother-country, that she would be subject to condemnation. On every principle of justice the employment of a vessel in this manner, not only to carry but to *cover* and protect enemy's colonial trade from the just rights of war, is such a gross departure from neutrality that I should have no hesitation to condemn expressly on this ground; but that is not necessary. The ground on which I condemn is that gross leaven of fraud which runs through every part of the transaction and contaminates the whole case, even on the neutrality of the property."

In the case of the "Rising Sun,"[1] an American vessel clearing from a French port, the destination was described in some of the ship's papers as Altona, in others as Charleston, whereas the true destination was Guernsey. But as these were both neutral ports, Sir William Scott did not think there was much in that point, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port.

The "Graaf Bernstorf"[2] was a similar case. Here a valuable cargo was seized on a voyage from Batavia to Copenhagen. The claim was originally made by the house of Black & Co., of Copenhagen, to the whole of the cargo, but some circumstances having transpired, an amended claim was put in, by leave, for the cargo as the property of Black & Co. and a Mr. Van Tromp, who was found by the Court to be a Dutchman. In condemning Van Tromp's share in the cargo, Sir William Scott found that the interests of Black & Co. were so complicated by those of Van Tromp as to require further proof. In refusing to extend this indulgence to Black & Co., Sir William followed the lines he had already laid down:—

"The general rule of the Court," he declared, "is certainly this: that where there has been a suppression of an enemy's interest with a fraudulent view, the party engaged in that fraud shall not be permitted to supply the defects of proofs of his own property mixed up with it. It

[1] 2 Rob., 104 (1799). [2] 3 Rob., 109 (1800).

appears to be a rule perfectly reasonable in its principle, and one that this Court would find it necessary to support, even if the authority of the Superior Court which has adopted it, had not made it absolutely binding upon its practice."

The American Courts have followed the same principles. In the case of the "St. Nicholas,"[1] it was held that where the enemy's property was fraudulently blended in the same claim with neutral property the latter was liable to share the fate of the former. In this case, said Mr. Justice Johnson, all the circumstances, all the hopes and wishes of the adventure centred in a hostile country. The nominal owners were only introduced into the bills of lading as a cloak. There was scarcely wanting one of those characteristics by which Courts Admiralty are led to the detection of neutral fraud. The ship and cargo were condemned.

Where false papers are used with the intention of deceiving the enemy and the trade is in fact innocent, such fraud is not sufficient of itself to entail confiscation.

In the "Sarah,[2] the cargo was documented as the property of persons at Emden whereas it was claimed as the property of persons in London. In either case it was not confiscable.

"It is said," declared Sir William Scott, "that the name of Abegg (of Embden) was used for the purpose of protecting it from the cruisers of the enemy—an artifice which this Court is not very scrupulous to detect, where it does not appear that there is any sinister purpose concealed under that pretence or that any enemy's interest is concerned."

But since the captors were misled by such false papers into capturing an innocent vessel, they were allowed their expenses.

"If," said Sir William, "English merchants resort to the expedient of protecting their trade by these false papers, it leads captors into expenses for which these captors ought not to be answerable."

By the municipal law of Russia, a ship's passport, on presentation by the master, if found to be false or tampered with, entails confiscation of both vessel and cargo.[3]

By Art. 4 of the ukase of 1 August, 1809, it is enacted that—

"Le passeport donné au navire ne peut être admis comme veritable, si l'on découvre que la navire, dans le temps où ce passeport lui a été délivré, ne se trouvait pas dans un des ports appartenant à la puissance au nom de laquelle il a été donné."[4]

Double documents with different destinations found on board entail the confiscation of the ship as well as the cargo.[5]

In Spain double papers of any kind entail confiscation of both ship and cargo.[6]

[1] 1 Wheat., 417 (1816).
[2] 3 Rob., 330 (1801).
[3] "Rev. de Droit Int.," X, 611.
[4] *Ibid.*, 613.
[5] *Ibid.*
[6] Negrin, 251.

Concealment, spoliation, or destruction of ship's papers.—In English and American practice concealment, spoliation, or destruction of papers does not of itself necessarily entail any penalty.

"Spoliation is not alone," declared Sir William Scott, "in our Courts of Admiralty, a cause of condemnation; but if other circumstances occur to raise suspicion it is not too much to say of a spoliation of papers, that the person guilty of that act shall not have the aid of the Court or be permitted to give further proof, if further proof is necessary."[1]

In this case the master, under apprehension of capture by a French cruiser, concealed or destroyed some letters. The greater part of the cargo was claimed "for the owner and the master," but Sir William rejected the claim of the latter on the ground of his spoliation of the papers.

"It is certain," said Sir William Scott in the "Hunter,"[2] "that by the law of every maritime court of Europe, spoliation of papers not only excludes further proof, but does *per se* infer condemnation, founding a presumption, *juris et de jure*, that it was done for the purpose of fraudulently suppressing evidence which if produced would lead to the same result; and this surely not without reason, although the lenity of our code has not adopted the rule in its full vigour, but has modified it to this extent, that if all the other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act. But though it does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption. A case that escapes with such a brand upon it is only saved so as by fire. There must be overwhelming proof arising from the concurrence of every other circumstance in its favour that forces a conviction of its truth, in spite of the powerful impression which such an act makes to its entire reprobation. It is the less necessary to examine this minutely, because the Court has admitted the introduction of proof not professedly and formally in that character of further proof, but manifestly so to be considered in substance and effect, consisting of affidavits and papers that do not appear to have been on board this vessel. The question remains whether, with the advantage of all the evidence that has been admitted, it answers the description of a case in which an unfortunate act of spoliation occurs, but which in all other respects wears the aspect of perfect sincerity and truth. In considering that question, it may be proper to consider the conduct of the parties, for conduct is a good expositor of facts. If the parties act in a way consistent with their statement, it greatly confirms the statement; if, on the other hand, they conduct themselves in a way that appears utterly irreconcilable with it, then it is not too much to say that the credibility of the statement is deeply affected by the contradiction of the facts."

"Concealment and even spoliation of papers do not ordinarily," said Story, J., "induce a condemnation of the property, but they always afford

[1] "Rising Sun," 2 Rob., 104 (1799.)
[2] 1 Dods., 480 (1815).

cause of suspicion, and justify capture and detention. In many cases the penal effects extend in reality, though indirectly, to confiscation. For if the cause labour under heavy doubts, if the conduct be not perfectly fair, or the character of the parties is not fully disclosed upon the papers before the Court, the concealment or spoliation of papers is made the ground of refusing further proof to relieve the obscurity of the cause, and all the fatal consequences of a hostile taint follow on the denial."[1]

The case of the "Madonna del Burso"[2] forms an apparent exception to the general rule. This was an Ottoman vessel with a cargo belonging to Greek merchants, which was seized in Dingle Bay, in Ireland, by a custom-house cutter on the ground of a false destination and the suppression and spoliation of papers.

In view of the fact that British prize courts had been in the habit of showing peculiar indulgence to vessels sailing under the protection of the Ottoman Porte, and that the custom-house officer had delayed instituting proceedings for considerably more than three months, Sir William Scott did not enforce the penalty of loss of freight and expenses.

If the cause had been properly prosecuted, the ship would have been immediately restored, and although a case of suspicion—of *vehement* suspicion against the cargo would have arisen—a suspicion principally excited by the behaviour of the master and the false representation of the voyage contained in the papers—this would not have amounted to a conclusive demonstration of the total falsehood of the claim. The effect of such misconduct would have merely operated to the forfeiture of freight and expenses on the part of the ship, and an order for further proof of the cargo would have been admitted.

"All the inconvenience sustained," said the learned judge, "would have been the delay of payment for the cargo, if proved to be neutral, and the forfeiture of the original freight for the ship—inconveniences not to be complained of by those who had brought them upon themselves, by prevaricating documents respecting the voyage, and by the rash and intemperate conduct of the master entrusted with it. . . . The practice of holding out a false destination (which in this case is sworn to have been done at the instance of the insurers) is unquestionably a bad practice, founded on a silly and dangerous policy, and penal to the party who employs it. But when I consider how familiar it is in the practice of other nations, and that even when it occurs there, it is not held, absolutely and conclusively, to bar the admission of further proof, unless the falsehood is supported by a concurrent falsehood of the depositions, or by other circumstances of grave suspicion—can I say in this case, when the master avows upon his deposition the real voyage he was to pursue, that it is to have more than its ordinary effect, particularly connected with the habitual indulgence shown to the subjects of the Porte?"

[1] Livingstone *v.* Maryland Insurance Co., 7 Cranch, at p. 544 (1813).
[2] 4 Rob., 169 (1802).

Where the captors were guilty of unreasonable and unjustifiable delay in instituting proceedings whereby heavy losses were entailed upon the ship and cargo, they render themselves liable to demurrage, compensation, and costs.[1]

WARRANTY OF NEUTRALITY.

Effect of false papers, and concealment, spoliation, or destruction of papers upon a policy of insurance.

Where there is a warranty of neutrality in an insurance policy upon the ship or cargo, the law is much stricter as to false papers.

"A warranty of neutrality," said Lewis, C.J., of the Supreme Court of the State of New York, "in a policy of insurance, imports not merely that the property is neutral, but that it shall be accompanied with all the accustomed documents to ensure its respect as such within the laws of nations. And although the question has never to my knowledge been decided, the same principle will require that it be unaccompanied with any document that shall compromit its neutral character. When the assured, by means of false papers or by any other improper conduct, invests the property with the double character of neutral and belligerent, be his motives what they may, he subjects it to a risk against which the underwriter did not insure, and of course releases him from all responsibility. The assured stipulates by his warranty that the insurer shall be liable for a neutral risk alone. The instant, then, that he attempts to put him to the hazard of a belligerent risk, he forfeits his claim to indemnity. . . .

". . . It is a maxim that neutral commerce is to be conducted with good faith towards belligerents. Their rights are to be respected as well as those of neutral nations. It is not sufficient that a part only, but the whole property covered by the policy must be neutral. And if a cover is attempted for *enemy's* property by an intermixture with neutral, it is held to subject the whole to confiscation."[2]

"It is undoubtedly true," said Story, J., "that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. It must also be conceded that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied and the property is thrown into jeopardy thereby, there can be no reasonable doubt that such conduct constitutes a breach of warranty."[3]

Accompanied by accustomed documents.—To comply with a warranty of "neutral property," it was held by the English Courts in the same year that the warranty must be accompanied with all the papers and documents required by the treaties between the States of the captors and the captured.

[1] The "Madonna Del Burso," 4 Rob., p. 169 (1802).
[2] Blagge *v.* N.Y. Ins. Co., 1 Caines, p. 549 (1804).
[3] Livingtone *v.* Maryland Insurance Co., 7 Cranch, p. 544 (1813).

Baring *v.* Royal Exchange Assurance Company[1] was an action against the underwriters for £5000 on goods, being one-half of the cargo, warranted American property, on board the "Rosanna," warranted an American ship. On the voyage from Surinam to London, Rotterdam, Amsterdam, or Hamburg, she was captured by a French privateer and carried into La Rochelle. Ship and cargo were condemned upon the ground that the provisions of the treaty of 6 February, 1778, between France and the United States had been infringed. By Article XXV of this treaty it was stipulated that the vessels of either party should be provided with sea-letters or passports specifying the name, the property, and the tonnage of the ship, together with the name and residence of the master. Further, a complete list of the crew and passengers was to be furnished to the marine officials at the port of embarkation, and a copy to be carried on board and produced when required.

It was held that the French sentence of condemnation, which had proceeded on the ground of infraction of treaty between France and the United States, was conclusive in our Courts against a warranty of neutrality of such ship and cargo in an action of insurance against the underwriters.

Baring *v.* Christie[2] was a similar case. Here the passport, instead of giving the residence of the master, described him as "George B. Dominick, master or commander of the ship called 'Mount Vernon,' of the town of Philadelphia." Upon the capture of the vessel by a French cruiser she was, upon the ground of this infraction of the treaty of 1778, condemned.

In delivering the judgment of the English Court upon the construction of this description, Lord Ellenborough said that "the town of Philadelphia" could not by any fair construction be referred to the master of the ship, but referred only to the ship, and that consequently the passport was not such as required by Article XXV of the treaty.

In Barker *v.* Phœnix Insurance Company,[3] it was objected that sailing without a register was a breach of warranty. At the time of the policy there were two kinds of American vessels, the one registered and the other unregistered, but carrying a sea-letter or official certificate of ownership. Both kinds were recognized by municipal law as American vessels, and both were equally entitled by the law of nations to protection as American property. In this case the vessel had a sea-letter, and Kent, C.J., held that there was no use in requiring a register for any object

[1] 5 East., 99 (1804).
[2] *Ibid.*, 398 (1804).
[3] 8 John., 307 (1811).

within the purview of the warranty. The want of it did not enhance the risk.

In coming to this conclusion, the learned Judge relied upon the opinion expressed by Sir William Scott in the "Vigilantia,"[1] where he went out of his way to lay down his view upon the abstract question of law.

> "I conceive," he said, "the rule to be that where there is nothing *particular or special in the conduct of the vessel* itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the *pass* of a foreign country she is considered as bearing the national character of the nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country."

Moreover, there must not be on board any papers which will increase the risk or falsify the warrant. A letter, therefore, in sympathetic ink, stating the property to be in other than the assured, is a violation of the warranty.[2] So, too, is any act or omission of the assured or his agent by claiming falsely or omitting to claim.[3]

But if there is no warranty of the national character of a ship, and she is not represented to be of any particular country at the time of the policy, she need not be documented as of the country to which she belongs, and if captured and condemned by a foreign State for the want of the documents required by treaty between that State and her own, the assured may recover against the underwriter.

In Dawson *v.* Atty,[4] Lord Ellenborough, C.J., said that as the ship was not represented as American at the time when the insurance was effected, the assured was not bound by it; and there being no undertaking in the policy itself that she was American, there was no necessity for her being documented as such. But the law as to documenting would appear to apply only to *express* and not to *implied* warranties. In Elting *v.* Scott and Seaman,[5] the policy contained no warranty of neutrality or of the character of the vessel, and, consequently, it was held that the assurers had taken on themselves all risks, belligerent as well as neutral. It was given in evidence that the vessel in which the cargo insured was shipped had not a sea-letter on board at the time of capture, and

[1] 1 Rob., 1 (1798).
[2] Cancre *v.* Union Insurance Company, Cond. Marsh, 406*a*.
[3] Galbraith *v.* Gracie, Cond. Marsh, 406*b*.
[4] 7 East, 367 (1806).
[5] 2 John., 157 (1807).

that the want of this or of some other papers was the cause of her condemnation. But it was held that where the national character of a vessel is not warranted or represented, it is not incumbent on the assured to show that she had a sea-letter or other papers required by the laws of the country or by treaties with foreign nations. Upon this point, Kent, C.J., in delivering the opinion of the Court, said:—

"I very much doubt whether it be part of the implied warranty of seaworthiness that a vessel shall have her proper documents on board. There is no case that goes to that length. These documents are only material when the *national* character of the vessel is warranted or represented. In the present case it does not appear to what nation or to what individual the vessel belonged. All that is stated is, that she was to sail on a voyage from Curaçoa to New York; the plaintiffs, as insurers of the cargo on board, took upon themselves belligerent risks. The sea-letter and other documents could only have been requisite to protect the vessel as a neutral, but it was no part of the contract that she was to sail in that character; or to protect her against the revenue laws of Curaçoa, but their laws we are not to notice; or to comply with the laws of our own country to which the vessel was bound, but there is no evidence that she was sailing in contravention of our laws. A vessel may be competent to perform the voyage insured without the possession of these documents; and although we do not profess to declare a very strong opinion on this point, we are inclined to think that the want of those documents could not have furnished to the plaintiff a valid defence against the policy."

To the general rule that concealment of papers constitutes a breach of warranty there would appear to be an exception, at any rate, in American practice. It was held in Livingstone *v.* the Maryland Insurance Company[1] that if by the usage of the trade insured it be necessary that certain papers should be on board, the concealment of those papers would not affect the assurer's right to recover upon the policy.

"The question," said Story, J., "must always be whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend that every idle and accidental or even meditated concealment of papers manifestly unimportant in every view before the prize tribunal should dissolve the obligation of the policy. And if by the usage and course of trade it be *necessary* or *allowable* to have on board spurious papers covered with a belligerent character, whatever effect it may have upon the rights of the searching cruiser, it would be difficult to sustain the position that the concealment of such papers, which, if disclosed, would completely compromit or destroy the neutral character, would be a breach of the warranty. In such case the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would

[1] 7 Cranch, 506 (1813).

induce the conclusion that the interest was enemy's covered with a fictitious neutral garb, the disclosure would not in such a case less authorize the same conclusion. In such case it would depend upon the sound discretion of the Court, under all the circumstances of the case, to allow the veil to be drawn aside and admit or deny the claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers (as he does in all cases where the usage of the trade demands it), he necessarily waives his rights under the warranty, so far as the visiting cruiser may demand the disclosure of such papers. In other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purpose of protection."

It was further held that no acts justifiable by the usage of the trade and done by the assured to avoid confiscation under the laws of one of the belligerents could avoid the policy. But any acts or omissions by the assured or his agents which, according to the published notification or decisions of the belligerents, though not according to international law, would enhance the danger of capture or condemnation, might if such acts or omissions were unreasonable, unnecessary, or wanton, form a sound objection to the right of recovery upon the policy. The insured can have no right to jeopardize the property by any conduct, which the fair objects of voyage or the usage of the trade do not justify.

With respect to the allowance of freight to neutral ships carrying enemy's goods, it is asserted on the authority of Sir Henry Martin,[1] an eminent practitioner and afterwards Judge of the Court of Admiralty, that so far back as the year 1640 it had never been the practice to condemn neutral ships for having enemy's goods on board without allowing freight for the enemy's goods which were condemned.

It was held in the "Carlos F. Roses"[2] that as the vessel was an enemy's vessel the presumption was that the cargo was also enemy's property, and this could only be rebutted by clear and positive evidence to the contrary.

Thus in the "Betsey"[3] it was held that a prize court of a belligerent Power is entitled to proof of the neutrality of the cargo on board an enemy's vessel, and that in the absence of proof may condemn it as the property of unknown belligerent owners.

Transfers of vessels prior to the declaration of war will be regarded with grave suspicion.

[1] "The Atlas," 3 Rob., 304, note.
[2] 177 U.S. Rep., 655 (1900).
[3] 36 Ct. Cl., 256 (1901).

It was held in the "Benito Estenger"[1] that transfers of vessels *flagrante delicto* cannot be sustained if subject to any condition by which the vendor retains an interest in the vessel or its profits, any control over it, or any right to its restoration upon the conclusion of the war. It was also held that the burden of proof of the validity of such transfers lies on the vendor claimants.

[1] 176 U.S. Rep., 568 (1900).

CHAPTER VIII

FORMALITIES OF CAPTURE

UPON taking possession of the prize the first duty of the captain is to appoint a prize master, who should if possible be the officer who made the visit and conducted the search, to collect and seal up all the ship's papers and to entrust them for safe custody to the prize master. In addition, all witnesses who will be required at the adjudication of the prize should, as far as possible, be detained on board and sent in with the ship.

Provided the crew of the prize consent to navigate the vessel, it is not necessary to put a prize crew on board, and in such case the captors are not responsible for any loss which may ensue on this account. But unless such consent is obtained, the captors are bound to put on board a sufficient prize crew to navigate the ship.

"Should they send," said Tilghman, C.J., in Wilcocks *v.* Union Insurance Company,[1] "but a single hand or so few that it was manifestly impossible to work her, this would not be taking sufficient possession. In that case neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider her as abandoned to them and act accordingly. But if a force insufficient to work the vessel is put on board by the captors in consequence of the promise of the neutral crew to navigate her to her destined port, they are bound by such promise and must be considered for the purpose agreed on as the hands of the captors."

In the case of the "Resolution"[2] two men only were put on board by the captor in consequence of a promise by the neutral crew to assist in taking the prize into a British port.

The "Pennsylvania"[3] having been captured by two British cruisers, a prize master and two men were put on board. These men being unable to navigate the vessel, the neutral master continued to direct her course according to his owners' instructions and refused to carry the vessel into Malta, as required by the prize master.

[1] 2 Binn. 574 (1809); Alexander, 1 Gall., 532, S.C., 8 Cranch, 169.
[2] 6 Rob., 13 (1805). [3] 1 Acton, 33 (1809).

"The neutral master and his crew," said Sir William Scott, "owe no service to the captors and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he conceives he owes to the owners. He will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are found to make any resistance. The captors therefore are left to pursue their separate interests; they are unable to navigate the vessel and the captain resumes his command."

"It is said," observed Story, J., in the "Alexander,"[1] "that no prize crew was put on board, that the navigation was left to the ordinary crew of the vessel. This objection proceeds upon the supposition that to constitute a capture as prize the vessel must be navigated by a prize crew. The supposition is not founded in law. It is true that the master and crew of a prize ship are not compellable to navigate her, but if they voluntarily engage so to do it is a legal waiver of the prize crew, and the parties are bound by their engagement, and the capture stands absolute."

In this case a prize master only was put on board.

Either of these courses having been taken, the prize must then be sent in for adjudication to the nearest and most convenient port. In the case of the "Anna,"[2] a vessel sailing under American colours from the Spanish Main to New Orleans, taken by a British privateer within a mile and a half of the western shore of the principal entrance to the Mississippi and sent in for adjudication to England, Sir William Scott said:—

"It lies on the captor to exonerate himself from the impropriety of this act, because although the instructions to cruisers give something of a discretion to captors as to the port to which they are to bring their prize, *to some convenient port*, it is a discretion which must be cautiously exercised and with sound reason, so as to be justified in the Court before which the case is brought. It would be cause of infinite vexation if neutral vessels taken on slight pretences at so great a distance as the coast of America were to be dragged across the Atlantic for adjudication, more especially when this country has established courts in different islands in the West Indies to prevent inconvenient recurrence to this Court, and to provide for claimants in that part of the world justice at their own doors, that their commerce may be subject to as little interruption as possible from the exercise of the rights of war on the part of this country in those seas. At the same time there may be circumstances that would justify such a procedure; as if a King's ship bound on the public service makes a capture in her course, such a vessel cannot depart from her instructions, but must proceed upon her original destination. That would be a case of necessity arising out of the public service for which States must make allowance reciprocally."

[1] 1 Gall., 532; 8 Cranch, 169 (1813).
[2] 5 Rob., 373 (1805).

The vessel was released upon the grounds that first she ought never to have been seized, and secondly her seizure was a violation of neutral territory. Damages for bringing her in for adjudication to England were decreed.

The "Catherina Elizabeth"[1] was a Swedish vessel on a voyage from Teneriffe to London. Whilst off Teneriffe she was seized by the privateer "Spy," and a prize crew being put on board, carried to Barbados. In this port she was seriously injured. Upon appeal the Court followed the precedent of the "Maryland,"[2] in which case the captor, a Liverpool privateer, was held to be highly censurable for carrying her prize, which had almost reached the coast of Europe, back to the West Indies. For this carrying to a remote port for adjudication the captors of the "Catherina Elizabeth" were condemned in the costs and damages sustained by the owners subsequent to the capture.

The "Hunter"[3] was an American ship captured off Canton, and was ordered to England. On her way home she put into the Madras Roads, where she remained more than five weeks.

"This Court," said Sir William Scott in delivering judgment, "is extremely disposed to hold it as generally proper that questions of capture, arising in that remote part of the world, should be decided there in the courts instituted for that purpose, although this Court, possessing an universal jurisdiction, has, of course, a concurrent jurisdiction with them all. At the same time, without meaning to give any undue encouragement to another practice, I am not prepared to say that circumstances may not possibly occur in which the contiguous courts may not be the most convenient to the king's cruisers in a fair legal estimate of convenience. Exigencies of the public service may call upon them to proceed to Europe; the nature of the cargoes taken may render them unfit for the Indian market in case of necessary conversion pending suit; the property may appear to belong to parties who are more in the vicinity of the European court of prize, and can communicate with it more promptly. These and other circumstances may influence a just and cautious discretion. Nor am I prepared to say that if a king's cruiser has upon justifiable reasons directed his prize to proceed to England, the mere coming into roads *in itinere* will induce a legal obligation to proceed to adjudication in the court that has the local jurisdiction. Ships must in so long a voyage touch at some intermediate places for purposes of necessary refreshment. It is and must be so done by all ships, and it is not the mere going in *in transitu* for such an occasion that will make it at all unlawful for the vessel to proceed upon the original destination if otherwise proper."

In the interpretation of the term *convenient* are also included the *security*, *capacity*, and *accessibility* to Courts of Admiralty.

[1] 1 Acton, 309 (1810).
[2] *Ibid.*, 310 (1810).
[3] 1 Dods., 480 (1815).

Security :—

"*Convenient*," said Sir William Scott in the "Washington,"[1] "is a large and general term, leaving a certain latitude of *discretion*, but a discretion to be cautiously exercised and with reference to the view which the Crown itself must be supposed to have entertained in issuing the instructions. *Conveniences* are of different kinds—some of a slighter nature, others almost indispensable. Among the most important must be considered that of bringing a vessel to a port where she may lie in safety, since that cannot unquestionably be deemed a *convenient port* which does not afford security and protection to the property that is brought in. An open road, for instance, where the ship may be occasionally exposed to the weather, cannot be a place of security. It is therefore quite impossible that it should be considered as a *convenient port* for the preservation of property."[2]

Capacity :—

"Another material ingredient of *convenience*," continued the learned judge, "will be that the port shall be of sufficient *capacity* to admit vessels to enter without unloading their cargoes, since it is the intention of the Legislature that bulk shall not be broken. If there is not depth of water to allow vessels to lie without taking out the cargo *non erit his locus*, since captors are not to meddle with cargo in any manner without the authority of the Court, which cannot be exercised until the vessel has been brought into port."

Accessibility :—

"It is also highly desirable," concluded his lordship, "that the port should be a place which holds ready communication with the tribunals which have to decide on questions arising out of capture; that the parties may have access to advice and may be enabled to obtain the necessary information; and that the directions of the Court of Admiralty may be carried into effect with despatch."

In the selection of a port, the interests of the owners of the vessel and cargo should, if possible, be considered. If these are unreasonably disregarded, the captors will render themselves liable for damages and costs.

The "Wilhelmsburg"[3] was seized on a voyage from Amsterdam to Archangel, and was sent in to Shetland.

"The captor," said Sir William Scott, "is certainly not justified under the Prize Act to select *any* port that he pleases. It must be a convenient port, and in that consideration the convenience of the claimant in proceeding to adjudication is among one of the first things to which the attention of the captor ought to be addressed. If the vessel had been sent, in the first instance, to Leith or Berwick, or to any of the principal northern ports of this kingdom, the consequences that have arisen in this case would not have ensued."

[1] 6 Rob., 275 (1806).
[2] See also the "Principe," Edw., 70 (1809).
[3] 5 Rob., 143 (1804).

What, asked Story, J., in the "Alexander,"[1] is necessary to constitute a capture?

"In ordinary cases the fact admits no doubt, and in point of law nothing more is necessary than an intention of capture, followed up by an actual or constructive possession of the property. Force and violence or physical superiority are not required. It is sufficient if there be a *deditio* or submission on the one side, and an asserted possession on the other."

If there was *animus capiendi* coupled with actual or constructive possession on the one side, and surrender on the other, the capture is absolute.

Bona fide possession.—Whenever the captors are justified in the capture, i.e. whenever there was *probable cause*, they are considered as having *bona fide* possession. *Bona fide* captors are not responsible for any losses or injuries, subsequent to the capture, arising from mere accident or casualty.

"That a *bona fide* possessor is not responsible for casualties, but that he may by subsequent misconduct forfeit the protection of his fair title and render himself liable to be considered as a trespasser from the beginning," was, said Sir William Scott in the "Betsy,"[2] one of the first principles of universal jurisprudence.

The casualty in this case was recapture. The "Betsy" was neutral American property, seized for alleged breach of blockade, and recaptured by the French. As it was held by the Lords of Appeal that there was no legal blockade, the vessel would have been entitled to be restored, but Sir William found that as it was doubtful at the time whether or not a blockade had been instituted, there was probable cause for the capture, and consequently, since there was *bona fide* possession, the recapture was an accident for which the captors were not liable.

"Captors," said Sir William Scott in the "Catherine and Anna,"[3] "are generally bound for two things—for safe and fair custody, and if the property is lost or destroyed for want of that safe and fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident or mere casualty happens against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged."

In the case of the "Carolina,"[4] it was alleged that the captors did not bring the vessel to adjudication as they should have done, and the vessel having been lost, the owners lost the opportunity of showing that the loss might have happened through some culpable negligence of the captors. The vessel was lost by accident and stress of weather, and since the capture was justifiable the captors were held not to be responsible. They were

[1] 1 Gall., 532 (1813).
[2] 1 Rob., 93 (1798).
[3] 4 Rob., 39 (1801).
[4] *Ibid.*, 256 (1802).

exempted from proceeding to immediate adjudication since they were engaged in the investment of Alexandria.

"It must be conceded," said Sir William Scott, "as a reasonable distinction, that commanders acting in the management of great expeditions cannot be tied down exactly to the same rules by which individual cruisers are directed to proceed."

In the case of Del Col *v.* Arnold,[1] a French privateer, "La Montague," captured the American brig "Grand Sachem," took out of her a large sum in dollars, put a prize crew on board, and directed her to steer for Charleston. When in sight of the light-house "La Montague" was captured by a British frigate, which also gave chase to the "Grand Sachem." The latter was run into shoal water and abandoned, and eventually scuttled and plundered.

It was held although the original capture was justifiable, it did not authorize or excuse any spoliation or damage, but that captors proceed at their peril, and are liable for all consequent injury and loss. It was also held that the owners of the privateer were responsible for the conduct of the officers and crew of the privateer to all the world. The prize crew were justified in abandoning the prize in order to escape captivity, but the removal of the money into the privateer and the subsequent scuttling of the brig were unlawful acts.

"Although captors," said Sir William Scott in the "Speculation,"[2] "may have made a justifiable seizure, yet they may still forfeit that title by subsequent misconduct."

Depositions had in this case been improperly taken, and all the crew but two men had been taken out of the prize. This, in Sir William's opinion, had the appearance of something very like a management and a tampering with evidence. The captors' expenses were ordered to be forfeited.

Captors responsible for acts of their agents.—"It is," said Sir William Scott in the "Der mohr,"[3] a principle of law undoubtedly that may operate with great rigour in particular cases; but it is one that the Court cannot depart from in any degree, that the principal must be responsible for the acts of his agent."

In this case the prize had been committed to the care of Captain Talbot, one of the joint captors, with directions to send on board a pilot to take her through the Needles. A pilot was accordingly sent on board by Captain Talbot, but the prize-

[1] 3 Dall., 333 (1796).
[2] 2 Rob., 293 (1779).
[3] 3 Rob., 129 (1800).

master refused to admit him, asserting that he was himself a pilot for the Needles and wanted no assistance. Further, the neutral master, who knew the passage very well, warned him to brace his yards sharper, but he refused. The vessel was lost, and it was lost, said Sir William Scott, by the misconduct of the prize-master, and it was impossible for him to steer clear of the rule of law that a principal is civilly answerable for the conduct of his agent. Restitution in the value of the ship was decreed.

Due diligence.—In the case of a justifiable seizure the captor must exercise due diligence. Sir William Scott, in the "William,"[1] declined to assent to the proposition that captors were only bound to exercise *such care* as they would take of their own property. Capture is not analogous to bailment. In the former

"there is no confidence reposed nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force, but still of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize-master. It is not enough, therefore, that a person in that situation uses as much caution as he should use about his own affairs. The law requires that there should be *no deficiency of due diligence.*"

Here the prize-master refused to take a pilot on board. The vessel, without any change of wind or any accident imputable to the weather, struck on a rock and went down in midday. The Trinity masters found that in not taking a pilot all was not done which ought to have been done, and that there was a want of due skill in not steering clear of the rocks. Restitution in value was decreed.

In the case of the "Portsmouth"[2] and other cases, it was held that it was a principal test of *due diligence* whether the prize-master availed himself of the ordinary opportunities of taking a pilot on board.

"As to the question of legal responsibility, it appears that there was a regular pilot on board, to whom the care of the navigation of the vessel was necessarily confided. If persons under him do their duty, and it is not shown that the cause of damage arises from any want of obedience in them, or from any cause assignable to the want of that control which the captor is bound to exercise over the crew, I am of opinion that the captor is exonerated."

Detention of neutral ship.—Where there has been unreasonable detention of a neutral vessel, which is clearly entitled to be restored, demurrage will be granted against the captors. In the case of the "Zee Star,"[3] there was a detention of the vessel for two months and twenty days after the claim had been put in,

[1] 6 Rob., 316 (1806).
[2] *Ibid.*, 317, note (1807).
[3] 4 Rob., 71 (1801).

the captors not consenting to restitution until the end of that period. No explanation of this want of due and necessary diligence was offered. Sir William Scott gave two months demurrage, together with costs and damages, and refused the captors' expenses.

So in the case of the "Peacock,"[1] which had been captured by an English privateer and carried into Lisbon, where she was detained six weeks upon the excuse that the privateer wanted to refit, and "they waited for an opportunity of sending the prize to England under convoy."

"It is the duty of privateers," said Sir William Scott, "to bring their prizes home to a port of this kingdom as soon as they can. King's ships may reasonably be allowed a greater latitude. It may sometimes be necessary for them to send their prizes to Lisbon, and in some cases I will not say that it may be absolutely improper for privateers. But it cannot be so necessary, and unless some very particular reason intervenes, it is their duty to bring their prizes home as soon as possible, unless they carry them to the port of Gibraltar."

Accordingly the captors were held liable to costs and damages, although the original seizure was not wrongful. They were allowed such expenses as would have been incurred if they had proceeded here.

It was stated in the "Susanna"[2]

"that the ship was seized as prize-at-sea, that certain persons were put on board, that the king's ship parted in chase of another vessel, that this schooner joined in the chase, and by carrying too much sail was upset and lost."

No claim was made upon the captors to proceed to adjudication until nearly six years had elapsed.

"The obligation on the captors," said Sir William Scott, "to institute proceedings may therefore, I think, be held not to attach quite so strongly as when a ship is brought into port, when the captor has taken complete possession and is bound by the express directions of the Prize Act to proceed to adjudication. Whilst the ship is at sea he may deliberate, and after mature investigation discharge himself of the custody. He may remain liable for misconduct in having detained at sea, but the obligation to proceed in the direct question of prize is not so imperative upon him as in a case where the vessel is actually brought in. If any inconvenience is to be apprehended from delay, that will be sufficiently counteracted by the opportuntity which the other party has of instituting proceedings and of calling upon the captor to compensate for the detention under another form than that of a prize proceeding. Under the circumstances of the present case, I cannot say that *any laches* is imputable to the captor; still less such as will remove the imputation of delay that is chargeable to the other party. The *onus* lay upon the claimant. He ought to have proceeded and within a reasonable time."

[1] 4 Rob., 185 (1802). [2] 6 Rob., 48 (1805).

The "Gerasimo"[1] was a Wallachian vessel seized by a British cruiser for an alleged breach of blockade. The seizure took place as the vessel was coming from Galatz, out of the mouth of the Danube. She was sent into Constantinople, where she was released upon security and the cargo sold. No tidings having been heard of the proceeds and the captors not having taken any proceedings, the claimants, on behalf of the owners of the cargo, commenced process here to compel the captors to proceed to adjudication.

"On the part of the claimants," said Dr. Lushington, "a very long argument was addressed to the Court, impugning the conduct of the captors and charging them with having improperly brought the vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the captors were responsible for such delay and all the consequences. The Court is not disposed to deny the truth and justice of the principle contended for; on the contrary, I am clearly of opinion that if a delay in bringing to adjudication and the non-examination of witnesses arose—though it may be almost impossible for the Government of the belligerent nation to prevent such occurrence—still that neutrals ought to be indemnified if injustice has been done them. The captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own Government for redress if they have been compelled to make good any injury sustained by neutrals in consequence of their fulfilling the commands which they dare not disobey. In many cases the captains of some of Her Majesty's cruisers may have a discretion to release at once, but this may not be so in case of a blockade, when special orders may have been given to capture and detain."

This statement of legal principles was adopted by the Privy Council upon appeal. What claim the captor might have upon the Government it was not, said their lordships, their duty to judge, nor had they any means of forming an opinion. His conduct appeared to them to be without any excuse, and they had no hesitation in advising restitution of the cargo, with costs and damages against the captor.

Delay by captors in proceeding to adjudication.—Captors ought to proceed to adjudication as soon as possible after the prize has been brought in, and if they delay the claimants may compel them to do so.

"During the existence of the prize commission," said Sir William Scott in the "Huldah,"[2] "there is no fixed and definite time by which the party can be said to be legally barred from calling on the captor to proceed to adjudication; although it may be proper to hold that there *must* exist a time which would work such an effect; but I know of no prescribed limitation against the admission of a claim, nor of any other means by which the

[1] 11 Moore, P.C., 88 (1857).
[2] 3 Rob., 235 (1801).

captor can protect himself but by applying to a court of competent jurisdiction. If he neglects to apply to any tribunal, he would be guilty of a great misdemeanour; if through misapprehension he applies to an improper tribunal, though he may defend himself against the charge of a misdemeanour, he cannot protect himself from the call of the claimant to proceed to adjudication before a competent tribunal. In this case there is no imputation of misconduct; the captor went to a Court which was sitting at St. Domingo apparently without authority; in that Court he obtained a sentence of condemnation, and distribution has taken place in consequence of it. But that Court having no authority, those proceedings are null and of no legal effect whatever. On the other hand, it was the duty of the claimant to have brought this matter before the Court as soon as he could; as it is always in the power of the claimant to compel the captor to proceed if he neglects to do so himself."

"However justifiable the seizure may have been," observed Sir William Scott in the "Madonna Del Burso,"[1] "the first obligation which the seizor has to discharge is that of accounting why he did not institute proceedings against the vessel and cargo immediately, and unless he can exculpate himself with respect to delay in this matter, he is guilty of no inconsiderable breach of his duty."

In the case of the "St. Juan Baptista,"[2] some Spanish prizes were brought into Falmouth on 12 August, but no proceedings were taken till 12 September.

"It must be understood," declared Sir William Scott, "by those who arm themselves with the commission of their country, that if they bring neutral ships into British ports they must on no account detain them there without inquiry. Grievous would be the injury to neutral trade and highly disgraceful to the honour of their own country if captors could bring in ships at their fancy and detain them any length of time, without bringing the matter to the cognizance of a court of justice."

Delay by claimants.—In the case of the "Mentor,"[3] the claimant only instituted proceedings sixteen years after the capture. In delivering judgment upon this and other points, Sir William Scott said:—

"It is not within my recollection that a case of such antiquity has ever been suffered to originate in this Court. I do not say that the Statute of Limitations extends to prize causes; it certainly does not; but every man must see that the equity of the principle of that statute in some degree reaches the proceedings of this Court, and that it is extremely fit that there should be some rule of limitation provided by the discretion of the Court attending only to the nature and form of the process conducted here by which captors or other persons should be protected against antiquated complaints. And if there is any case of remote antiquity which ought not to be entertained, undoubtedly *that* would be one in which it clearly appeared that the party complaining had been fully apprized of the nature of his injury and of the mode of redress which he ought to have pursued."

[1] 4 Rob., 169 (1802). [2] 5 Rob., 33 (1803).
[3] 1 Rob., 179 (1799).

The "Susanna"[1] was a claim to proceed to adjudication six years after the capture.

"The fact on which the application is made," said Sir William Scott, "is therefore of a very antiquated date; at the same time I will not say that mere time alone would be an absolute bar, if the claimant had shown that he had used due diligence and that he had been prevented by circumstances of inevitable and incurable necessity from prosecuting his demand in due time. . . . If a claimant has mistaken his way and has not pursued his remedy in a proper manner and in due season, his error should not expose other parties to the inconvenience of being harassed by proceedings at this distance of time, when the very circumstance of delay has unavoidably occasioned additional difficulties in establishing their defence and on a point which must at all times have been considered as a question of delicate and difficult discussion."

Treatment of neutral crew by captors.—Upon the capture of a neutral ship the crew ought not to be put in restraint, handcuffed, or put in irons except in extreme circumstances. In the case of the "St. Juan Baptista"[2] there had been some slight resistance, since the neutral crew were in ignorance that war had broken out between Great Britain and Spain, and the captors were taken for pirates. Upon the charge of ill-treatment of the crew Sir William Scott declared the imputation of such a practice, "if proved to have existed in the extent alleged and without necessity, must be pronounced to be disgraceful to the character of the country; since no one who hears me will deny that to apply even to enemies modes of restraint that are unnecessary and at the same time convey personal indignity and personal suffering is highly dishonourable. It is alleged in this case that the Spanish crew, to the number of twenty-two persons, were put in irons." The sum of £100 was ordered to be distributed amongst the men so confined by way of damages.

In the case of the "Die Fire Damer,"[3] the prize-master was found to have been in a continual state of intoxication, and to have been guilty of great cruelty and misbehaviour to the crew of the neutral vessel. A sum of one hundred guineas was ordered to be paid by the owners of the privateer, to be distributed amongst the ten hands which formed the crew of the captured vessel.

"It would be disgraceful," said Story, J., in the "Lively,"[4] "to the character of the country to suffer a practice to exist which, setting at defiance the rules of civilized warfare, should consummate a triumph over an enemy by personal indignities or modes of restraint unnecessary for the general safety. Much less ought such conduct to be tolerated towards neutrals or citizens of our own country. And when the case should be clearly made out, accompanied with undeserved suffering or malicious injury, the Court could never hesitate to pronounce for exemplary damages."

[1] 6 Rob., 48 (1805).
[2] 5 Rob., 33 (1803).
[3] *Ibid.*, 357 (1805).
[4] 1 Gall., 315 (1812).

Inviolability of neutral property on captured vessel.—It is the duty of the captors to preserve the ship and property in the same condition as that in which they received it. Except in case of urgent necessity, they must not break bulk, or remove, convert, or embezzle any of the property, or spoil or damage the ship or its furniture in any manner whatever.

Conversion.—The "L'Eole"[1] was a French vessel captured off the coast of Africa by three British privateers. Fourteen slaves on board were taken out, and the rest of the cargo was bartered away for a numerous cargo of slaves, who were shipped on the prize and sent to Barbados for adjudication.

"Was there any necessity," asked Sir William Scott, "for this transaction? It is to be observed, in the first place, that captors have no right to convert property till it has been brought to legal adjudication; they are not even to break bulk. They can have no justification for converting such property, except in cases of physical necessity, which overpowers all ordinary rules. If a case arises in a distant part of the world and it is known that the goods were perishing, I must not deny that such a justifying cause of conversion might be pleaded upon property so acquired; but no such case is presented to the Court. It is not alleged that the cargo was perishing, but merely that the goods could not be sold as well elsewhere, or in other words, that it would not be so good a prize. That is not enough. It is not even averred in any affidavit that the goods were of a perishable nature, or if perishable, that they might not have been disposed of to some other trader on the coast. Suppose the Court had gone so far as to justify a conversion, I cannot but think that the barter for slaves is the last mode of conversion that should have been adopted. The captors might have taken gold-dust or other articles of commerce known in the traffic of that country. To trade in slaves is a species of commerce which the humanity of the Legislature has fenced round with peculiar regulations, every one of which is overlooked in this act of these individuals."

Embezzlement.—In the case of the "Concordia,"[2] it appeared that the prize-master demanded the keys and forced open certain packages, in consequence of which a number of bales of linen were missing. Restitution of the cargo had already been ordered, and it was in possession of the Dutch commissioners. Those in possession were ordered to make full restitution, with leave to call upon the captors to make good the deficiencies of embezzlements happening whilst the cargo was in their hands.

When a large sum of cash was taken out of a prize by a privateer, the owners were held to be responsible for its removal.[3]

After the deposit of the cargo in suitable warehouses under a commission of unlivery, the captors are only responsible for due diligence, and are not answerable for loss through burglary or robbery.

[1] 6 Rob., 220 (1805). [2] 2 Rob., 102 (1799).
[3] Del. Col. *v.* Arnold, 3 Dall., 333 (1796).

In the two cases of the "Maria" and the "Vrow Johanna,"[1] the captor was charged with negligent keeping.

"If this charge had been made out," said Sir William Scott, "there can be no doubt but that he would be answerable to the utmost; for the captor holds but an imperfect right; the property may turn out to belong to others, and if the captor puts it in an improper place or keeps it with too little attention, he must be liable to the consequences if the goods are not kept with the same caution with which a prudent person would keep his own property. But there is no ground for any imputation of personal negligence in this case, because it appears that the loss happened by burglary, the warehouse having been broken open and the goods stolen."

This, explained the learned judge, is not a case of a bailment for a reward. Persons who receive no consideration for their custody are only required to show such care and due diligence as they would apply to their own property.

"The goods were taken *jure belli;* the captor had a right to bring them in, and if any accident had happened in so doing, he would have been excusable except for want of due care on the part of himself or his agents. When the goods were brought in they were placed under the custody of the law. It became necessary to take them out of the ship, and the captor obtained a commission of unlivery from the Court; they were put into warehouses, and nothing has been advanced to show that those warehouses were not proper places and sufficiently secure. The question comes forward, therefore, on the general principle, and on this point I am disposed to think that the captor is not responsible for a loss happening to goods whilst they were under the custody of the law. . . . If the captor has used due diligence he is exonerated; it is necessary to show negligence on his part in order to fix a responsibility upon him."

"This Court has held," said Sir William Scott in the "Rendsberg,"[2] "private captors discharged from responsibility where the property has been shown to be missing without any default on their part."

Where property was lost by the negligent custody of the marshal, he was held liable for the loss.

Right of Crown to release prize before adjudication.

The power of the Crown to direct a release of property seized as prize, before adjudication and without the consent of the captors, is an inherent right which is not taken away by any grant of prize conferred in any Order of Council, Proclamation of Neutrality, or the Prize Acts.

"The rights of the Crown," said Sir William Scott in the "Elsebe,"[3] "are public rights, conferred not merely for private purposes or for personal splendour, but for the public service, and to answer the great exigencies of public interests and claims of public justice; as such, they demand the active protection of every court in which the occurrence of them is

[1] 4 Rob., 348 (1803).
[2] 6 Rob., 156-7 (1805).
[3] "Elsebe," 5 Rob., 174.

suggested to arise. The right which is asserted by the claimant, and is denied on the part of the captor, is that of releasing ships and goods that had been taken *jure belli* before adjudication and *without the consent of the captors*. I say *without consent*, because I think I must hold, upon the present evidence, that the captors have not done any act by which they can be considered as communicating their consent."

The learned judge then reviewed the evidence upon the questions whether the Crown had, in fact, exercised its power of release, and whether the claimant had not renounced the benefit of it. The first question he held to be sufficiently proved by an official letter from the Secretary of State for the Foreign Department to the Minister of the country whose subjects were principally interested, informing him *that the ships were released, and that orders had been given by the Lords of the Admiralty for that purpose*. The form of such communication signified nothing. Whether it was in writing or verbal and by what means it reached its destination were immaterial. So long as it had proceeded from the State and bore the impress of that original authority, and had not been disavowed or seceded from, the Court was bound by it.

Upon the second question the learned judge found that it was competent for the claimant to decline to avail himself of the benefit of the release, and to apply to a court of justice for a more ample compensation.

"If he had appealed," said Sir William, "from the Government to the Court of legal redress, the Court must have received the complaint, and have proceeded to an ultimate determination on the quantum of the grievance alleged, and by such a conduct the party might fairly have been considered to have waived the benefit of a partial release."

These questions having been disposed of, the question of right remains, "How far can the Crown release at any time before adjudication without the consent of the captors?"

"It is admitted," continued the learned judge, "on the part of the captors . . . that their claim rests wholly on the Order of Council, the Proclamation, and the Prize Act. It is not (as it cannot be) denied that, independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown. No man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject—*Bello*

parta cedunt reipublicae. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the Power to whom it belongs to decide peace or war may use it in the most beneficial manner for the purposes of both. A general presumption arising from these considerations is that the Government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption must be taken also the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules than those which are applied in the construction of the grants of individuals. Against an individual it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property, and no alienation shall be presumed, except that which is clearly and indisputably expressed.

"With these rules of interpretation the title deeds of the captors must be considered, to determine whether the Crown has in those deeds renounced that power, which in principle it possesses and in practice has frequently exercised. If there is anything which can be supposed to produce that effect, it must be the conveyance of a right of some species or other to other persons, and these can be no other than the captors, in virtue of which they claim an indefeasible interest in prize once taken. The right contended for is a right *to seize and bring in to adjudication* all ships of the enemy. Does the right *to seize* thus generally given alone bind the Crown, so as to bar it from any further exercise of its power with respect to seizures? Certainly not; for after that right is given *to seize all ships* of the enemy, the Crown can exempt as it sees fit. The Crown which declares general hostilities can limit their expiration. It can except individuals. It grants particular passes. It exempts particular classes of the enemy's ships, notwithstanding *the right* thus given of *seizing all ships.* If, then, the right of seizing all ships thus generally given does not bind the Crown in its power of qualifying that right by subsequent modifications, on what ground is it contended that the exercise of its power with respect to proceeding to adjudication is barred by the mere act of seizure? The mere act of seizure surely cannot work any such effect: it is an act in itself in some degree always dubious till adjudication and possibly erroneous; yet this dubious act is to convey to the party a right indefeasible *to proceed to adjudication* when the very proceeding may be a further wrong done, an aggravation of costs and damages already occasioned by the improper seizure! I attended with great impatience to the able argument of Dr. Arnold to learn what was the specific nature of the right conferred on the captors by the act of seizure, to which the effect of barring the power of the Crown to release is to be attributed. It is admitted to be in *degree* an *imperfect right.* In *species* it was stated, if I understand the argument, to be a *jus persequendi,* a right of action and no more; no right of interest, but *a mere right of bringing to adjudication.* Whatever is the nature of this right, it is conveyed only in the Order of Council; it is not given in the Proclamation or the Prize Act. It is, indeed, recited in both as a thing otherwise existing, but it makes no part of the powers conferred in either of those

instruments. Now, according to the construction which is, in my opinion, to be put upon this matter, this *jus persequendi*, as it is called, is *not a right* conveyed, but *a duty enjoined.* Captors have generally a right to seize, subject to this duty of bringing to adjudication—a duty enjoined that they may not make seizures without bringing to adjudication—a duty enjoined that they may not make seizures without bringing the ships and goods seized to the notice of the proper tribunal in order to prevent the right of seizure from degenerating into piratical rapine. If the Crown imposes that obligation, the Crown can release it. Supposing the Proclamation and Prize Act to be out of the way, and that the matter stood singly upon the Order of Council, there can be no doubt that the Crown could so release. The Crown imposed the obligation, and so far as the Order of Council alone is considered, the Crown retains the whole interest. If the prize is condemned, it must be condemned to the Crown, and for its interest, for the Order of Council gives no interest to the captors. No doubt could exist, supposing the matter to stand on the Order of Council alone, that the Crown is completely *dominus litis*, and also *dominus rei litigatae*, supposing there is no claim maintainable on the part of any neutral proprietor.

"As far as any right to the extent contended for can be supposed to be vested in the captor, then it must be attributed to some enlargement of these rights given by the Order of Council, derived from the Prize Act and Proclamation. Let us consider what this enlargement is. The Proclamation gives the whole property, but *not till after adjudication:* until that time no beneficial interest attaches. So the Prize Act, in like terms, gives *the whole interest or property* in opposition to that proportional and partial interest given by former Acts,[1] *but not till adjudication.* In adverting to these instruments, it is impossible not to remark the very guarded terms in which the benefit is conferred. The Proclamation gives to privateers '*after final adjudication and not before*,' not merely *after adjudication*, but superadding a negative pregnant, '*and not before.*' With regard to king's ships, the grant is expressed with similar caution; it gives the neat produce of all such prizes taken, *the right whereof is inherent in us and our crown.* And again, 'It directs that such prize may be lawfully sold or disposed of by them and their agents *after the same shall have been finally adjudged lawful prize and not otherwise.*'

"What is the use of these guarded expressions? Surely not merely the object of protecting the interests of the claimant till after adjudication. The Crown cannot be supposed to be anxious to make a reservation or exception of that which without any exception would be perfectly safe, for no interest of the Crown or its grantor could divest the interest of the claimant. The reservation must *ex necessitate rei, ex defectu alicvjus alterius materiae*, apply to rights over which the Crown has a dominion, and which, unless reserved, it might be supposed to have granted away. What are these rights? The right of controlling the whole proceeding till final adjudication, the right of declaring that the party shall not be farther proceeded against as an enemy, the right of suspending hostility against him with regard to property which has been seized under the general order of reprisals. For such purposes, and such purposes only, it must be that the Crown has declared that till after adjudication the

[1] See 4 & 5 Will. & Mar. c. 24, and 6 Ann. c. 13, by which officers and seamen of Queen's ships, privateers, etc. were given the sole property in all prize ships.

captor has no interest which the Court can properly notice for any legal effect whatsoever. In the case of captures made by the King's own ships, the authority of the Crown is most marked upon the face and in the substance of every part of the proceedings in the most emphatical manner. The Crown officers are the prosecutors in the name of the Crown; the final adjudication under the very terms of the Act is a condemnation to the Crown, and most clearly the interest would vest in the Crown under that condemnation if the Act had not expressly superadded that it should enure to the benefit of the captor. In seizures made by private ships of war the hand of the sovereign authority is less visible in the mode and style of proceeding; but the right of the Crown is sufficiently guarded by the repeated declarations that the interest shall vest in such captors '*after final adjudication and not before.*'"

His lordship then dealt with the practice with reference to the instances cited. The practice for the Crown to direct the release of ships he conceived to have been unquestioned. He referred to one class of cases, viz. restitution at the termination of a war stipulated for in the Preliminary Articles of Peace, from which such a power might be inferred to exist in the Crown. In such cases it is not easy, said Sir William,

"to conceive a power lodged in the Crown to secure that retrospective effect, to the conclusion of a treaty, without supposing also a corresponding power over the acts of its own subjects, to supersede the intermediate events of war, and to annul captures, *rightly made*, up to the moment of ratification under the only known rule of action then promulgated and communicated to cruisers for the government of their conduct."

Upon the larger question of public policy, Sir William was content to point to the obvious menace to the State of placing in the hands of the pettiest commander the power to force on, in spite of all the prudence of the Crown, the discussion and decision of the most delicate questions—the discussion and decision of which might involve the country in the most ruinous hostilities.

"I am of opinion," concluded the learned judge, "that all principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to adjudication, which I must pronounce to be still inherent in the Crown."

Destruction of enemy vessels by a belligerent.—When from some cause, such as the dangerous condition of the ship, the possibility, if released, of it giving information to the enemy, want of men to form a prize crew, disease, lack of provisions or water, the prize if enemy's property may be ransomed,[1] sold, retained and used as a tender to the captor's own ship, or destroyed. During the Anglo-American War of 1812 the

[1] The English Regulations forbid ransom.

United States adopted the policy of burning all British prizes in the endeavour to cripple the enemy's commerce; and in the American Civil War the commander of the "Alabama" burned most of his captures, since the Confederate ports were blockaded and the neutral ports of England, France, and other maritime States were closed to his prizes. If an enemy's ship and cargo are destroyed under some necessity, care must be exercised in taking out all the persons on board together with their baggage. A good illustration of such necessity is the case of the "Felicity,"[1] which had been captured during the Anglo-American War of 1812 by the British cruiser "Endymion" after attempting to reach the coast of America in a shattered condition and under unsettled and boisterous weather. The captain and crew with their baggage were removed on board the cruiser, and the "Felicity" was destroyed.

"Taking this vessel and cargo to be merely American," said Sir William Scott, "the owners could have no right to complain of this act of hostility, for their property was liable to it in the character it bore at that period of enemy's property. There was no doubt that the 'Endymion' had a full right to inflict it if any grave call of public duty required it. Regularly a captor is bound by the law of his own country conforming to the general law of nations to bring in for adjudication, in order that it may be ascertained whether it be enemy's property, and that mistakes may not be committed by captors in the eager pursuit of gain, by which injustice may be done to neutral subjects and national quarrels produced with the foreign States to which they belong. Here is a clear American vessel and cargo, alleged by the claimants to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for condemnation, which must have followed if it were mere American property; and the captors fully justified themselves by the law of their own country, which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war the 'President,' with intent to encounter her, though of inferior force, would not permit her to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If it is impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss."

Dr. Lushington is equally emphatic in the "Leucade."[2]

"The destruction of a vessel under hostile colours is a matter of duty. The Court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even

[1] 2 Dod., 383 (1819).
[2] Spinks, 217 (1855).

praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing in to adjudication of an enemy's vessel is not called for by any respect to the right of the enemy proprietor when there is no neutral property on board."

In the war between the United States and Mexico, the "Admittance,"[1] an American vessel, was seized upon suspicion of trading with the enemy, and with its cargo sold without being sent for adjudication to the United States.

In supporting this conduct of the captors, Taney, C.J., said :—

"As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the Act of Congress in cases of capture by ships of war of the United States; and this Act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can be finally deprived of his property.

"But there are cases when, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient crew to man the captured vessel, or when the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States. But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the Court may refuse to adjudicate upon the validity of the capture, and may award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause."

Bluntschli, however, is opposed to destruction except in cases of necessity,[2] and even Captain Semmes of the "Alabama" ransomed his prizes wherever neutral goods were on board.[3] Heffter considers destruction inexcusable except under dire necessity.[4] In the Franco-German War of 1870 the French commander Desaix burned two German merchant ships as he could not spare prize crews, and compensation for the destruction of neutral property on board was refused by the French prize court. When, in the Russian-Turkish war of 1878, Russian ports in the Black Sea were blockaded, the Russians burned the enemy's ships, the Institute of International Law in Congress at Turin in 1882 fully recognized their right.

In commenting upon the action of Captain Semmes, Mr. Charles Clarke, relying upon the judgments of Sir William Scott

[1] Jecker *v.* Montgomery, 13 Howard, 498 (1851).
[2] Mod. Völkerrecht, sec. 672.
[3] "Service Afloat," 141. [4] Sec. 138.

in the "Actæon"[1] and the "Felicity,"[2] urges that, except under the pressure of paramount necessity for self-preservation, the destruction of enemy ships without bringing in for adjudication ought to be declared unlawful and deserving of reprobation and punishment. The mere convenience of disembarrassing yourself of a captured ship can be no justification or excuse for, on your own judgment, treating it forthwith as your own lawful prize and destroying it.

Although adjudication is "for the benefit of the neutral," it is asserted, he says—

"that the captured ship, being an enemy or sailing under an enemy's flag, may for the convenience of the captor be burned to the water's edge; yet it may be chartered by a neutral and filled with the goods of a neutral, goods, if you like, purchased from the enemy, being either at that moment or at a future time to be paid for in cash or in other goods, and therefore to all intents and purposes, even under the law of bankruptcy and of carrier's liability, the property of the neutral. This is a proposition which, though not made in terms (for so making it would have startled its makers), is inevitably involved in the pretence that because a captor has no ports nor courts, he may at once burn every ship he meets with sailing under the enemy's flag. Everything is assumed to be enemy's property because the ship's flag is enemy's. No assumption can be more absurd. In the present state of the world, when no nation is the almost sole carrier for the goods of the whole world, and when therefore, as convenience dictates, anybody's goods are put on board of anybody's ship, the opportunity and speed of transit and the cost of freight being the only motives for the selection, this sweeping rule of destroying everybody's goods with a ship that sails under any particular colours, is an application of the rule of piracy which may be very convenient to the pirate, but is wholly unjustifiable as to any one else."[3]

Destruction of neutral vessels.—But a neutral vessel must never be destroyed. If it is impossible to bring her within the jurisdiction of a court competent to adjudicate upon her, she must be immediately released.

If, however, she can be sent into a neutral port with safety and the neutral authorities allow her to lie there, it is permissible to send her there. In that case, all witnesses and documentary evidence must be sent to the nearest port of the captors containing a prize court.

The general rule of justice which forbids the destruction of a neutral vessel was laid down by Sir William Scott in the clearest manner.

In considering the effect of his judgments, it must be borne in mind that Great Britain was at this moment (1812) at war with both France and the United States, one consequence of which was

[1] 2 Dods., 48 (1815). [2] *Ibid.*, 381.
[3] Papers read before the Juridical Society, Vol. III, 1863–70, p. 13.

the necessity for a constant supply of American flour for the use of the British army in Spain.

Licences were therefore issued to all, except French, vessels, being unarmed and not less than 100 tons burthen and bearing any flag, except that of France, to import into Cadiz from any port of the United States cargoes of grain, etc., without molestation on account of any hostilities which might exist between Great Britain and the United States, notwithstanding such vessels and cargoes might belong to American citizens. These licences were issued upon condition that those vessels should not return to blockaded ports, and that the names of the masters should be endorsed thereon at the time of the vessels clearing from their ports of lading. They continued in force for twelve months.

The "Actæon"[1] was an American ship which under such a licence had taken a cargo of flour to Cadiz and discharged there. Upon the production of this licence to the British Minister, it was endorsed with permission to return with cargo to any port of the United States. In the course of the voyage to Boston, the "Actæon" was boarded by several British ships, the commanders of which, upon examination of the licence, allowed her to proceed. When approaching American waters she was captured by the English cruiser "La Hogue," commanded by the Hon. Captain Capel, who, in consequence of a strong American squadron in his neighbourhood, found it impossible to weaken his crew by putting a prize crew on board, and equally impossible to allow her to proceed, as the exact strength and position of his own squadron would thereby have been communicated to the American Government, and might have entailed very serious injury to the public service. The "Actæon" was therefore set on fire and the ship and cargo destroyed.

At the instance of the American claimants a monition was issued calling upon the captors to proceed to adjudication of the ship and cargo. An appearance was given under protest for the captor, who did not contend against a sentence of restitution, but objected to the payment of costs and damages upon the ground that they had not been guilty of wilful misconduct.

In considering the measure of restitution to be awarded, Sir William Scott said:—

"The natural rule is that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution, with costs and damages. This is the general rule upon the subject; but, like all other general rules, it must be subject to modification. If, for

[1] 2 Dods., 48 (1815).

instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture—if he has by his own conduct in some degree contributed to the loss—then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution.

"This is the general rule of law applicable to cases of this description and the modification to which it is subject. Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own Government, but still the party to whom the property belongs must not be a sufferer. As *to him* it is an injury for which he is entitled to redress from the party who has inflicted it upon him, and if the captor has by the act of destruction conferred a benefit on the public, he must look to the Government for his indemnity. The loss must not be permitted to fall on the innocent sufferer."

In conclusion, the learned judge found that the conditions under which Captain Capel laboured were circumstances which might have afforded very good reasons for destroying this vessel, and might have made it a very meritorious act in Captain Capel as far as his own Government was concerned, but which furnished no reason why the American owner should be a sufferer.

"I do not see," he declared, "that there is anything that can fairly be imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, he is entitled to receive the fullest compensation from the captor. It does not appear that Captain Capel is chargeable with having acted from any corrupt or malicious motive, and if, as I believe has been the case, he has acted from a sense of duty and of obedience to the orders he received, I can have no doubt that he will be indemnified upon a proper representation being made to the Government. But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution with costs and damages."

The same order was made in the "Rufus," but in the "William," where the licence was rather doubtful in point of authority and the capture justifiable, simple restitution only was decreed.

The "Felicity"[1] was also an American vessel which, during the same war, had carried a cargo of provisions to Cadiz under a British licence and was returning to Boston under similar protection when she was captured by the British cruiser "Endymion" and destroyed.

That part of Sir William Scott's judgment which deals with the destruction of the enemy's property has already been set out.

[1] 2 Dods., 381 (1819).

"If a neutral ship or a protected ship," said Sir William, "is destroyed by a captor, either wantonly or under an alleged necessity in which she was not directly involved, the captor or his Government is answerable for the spoliation." Again, he says, "Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own State; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These rules are so clear in principle and established in practice that they require neither reasoning nor precedent to illustrate or support them. In the present case it is contended that the hostile character was disarmed by a licence; and I see no reason to dispute either the existence of the licence or its authority. It had been granted under circumstances that have been justly described as favourable. . . . It is not to be denied that these facts [viz. her services] create claims of a very strong and commanding nature—claims which are quite irresistible, if urged in a proper manner. And the only question is, whether these claims are so brought forward as to affect the captor with responsibility. I take it to be clear that if the captor knew of the licence, either from its production or from other circumstances which ought to have satisfied him of its existence, he is liable to the whole extent of the mischief done . . . it is *as* clear a proposition that if the existence of the licence was not disclosed to him and he had no sufficient means to inform himself, he is not a wrongdoer. The act, if tortious, is the act of the persons who withheld the information they were bound to have given him before the act of destruction took place. If they held out the ship and cargo to be the enemy's property, he had still more right to treat it as such. There is no case in which the rule *de non existentibus et non apparentibus* can more justly apply than when a man is called upon to answer for a case occasioned by the act of concealment of the complainant himself. If a ship armed with a protecting licence, which is not alleged or produced at the time of capture, is brought in under circumstances that did not at all compel and authorize an immediate destruction, the Court would subsequently restore that vessel, but it would indemnify the captor to the utmost extent of all the expense he had been put to by that act of concealment or denial. The ship in this case being destroyed cannot be restored; but if she was justifiably destroyed, under an ignorance produced by such an act, the Court owes the captor the same protection to the fullest extent. Was the knowledge of this licence communicated to the captor, or was it necessarily to be inferred by him before the act of destruction took place?"

Both these questions the learned judge answered in the negative, freeing the captor of all responsibility and condemning the claimant in the costs of the proceedings.

Dr. Lushington took substantially the same view in the "Leucade,"[1] a vessel sailing under Ionian colours and captured by a British cruiser during the Crimea War on the ground of illegal trade with Russia. She had been brought in for adjudication, and the claimants in addition to restitution asked for costs and damages. "When a vessel under neutral colours is detained,"

[1] Spinks, 217 (1855).

said Dr. Lushington, "she has the right to be brought to adjudication according to the proceedings in the prize court; and it is the very first duty of the captor to bring it in if it be practicable."

"From the performance of this duty the captor can be exonerated only by showing that he was a *bona fide* possessor, and that it was impossible for him to discharge it. No excuse as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as for the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is if a ship under neutral colours be not brought to a competent Court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her."

It is clear from this passage that Dr. Lushington contemplated cases of the destruction even of neutral vessels under pressure of paramount duty, and what he was laying down here was that if the vessel was destroyed under such circumstances mere restitution of the value would not suffice, but costs and damages must be added.

There is nothing in these cases indicating any *right to destroy* on the part of the belligerent. If he does destroy, and it turns out that the vessel was not committing any offence against neutrality, then, no matter how important to the public service of his own State, he or his Government is answerable to the claimant for the fullest compensation.

Professor Holland has summarized these cases as follows: "An enemy's ship after her crew has been placed in safety may be destroyed. When there is any ground for believing that the ship or any part of her cargo is neutral property, such action is justifiable only in cases of the gravest importance to the captor's own State, after securing the ship's papers, and subject to the right of the neutral owners to receive full compensation."[1]

With all respect to Professor Holland, it would appear that his conclusion that the destruction of a neutral ship is "justifiable only in cases of the gravest importance to the captor's own State" is entirely unwarranted by any principle, rule, or usage of international law, and is equally opposed to every principle of jurisprudence. Mr. Arthur Cohen, K.C., denies that this construction is correct. He asserts that the liability to compensate implies that the destruction is unjustifiable as regards the owner, and that the only remedy for a wrongful deprivation of property is the recovery

[1] "Times," 6 August, 1904.

of compensation from the wrongdoer. But it is more than this; it is an offence against international law. Surely, under every system of modern jurisprudence, the compensation to the one deprived is of secondary consideration. The offence is primarily an offence against the State, and the penalty inflicted by the State must be paid first.

These cases do no more than establish the proposition that if neutral property is destroyed without justification, restitution must be made, coupled with costs and damages. They simply declare the penalty to be paid to the injured person, and that such penalty must be paid by the captor or his Government, thus recognizing that it is an offence against international law. But they do not confer upon the captor any right to destroy.

This is not a mere verbal controversy. It has had far-reaching effects. Upon this theory of justification some nations have built up a claim to destroy neutral property under certain circumstances, varying according to the necessities of time or place. Thus Russia claims the right to destroy upon the ground of her distance from her own ports.

The "Knight Commander" was an English ship with a cargo of American goods, which was captured in 1904 by a Russian cruiser, and, on the grounds that she was carrying contraband of war and that it was extremely difficult for her to be brought in for adjudication, she was sunk. She was subsequently condemned by the Vladivostok prize court.

Professor Holland endeavours to support his view by citing the naval regulations and naval codes of Russia, France, and the United States. By Art. 21 of the regulations of 1895 and Art. 40 of the instructions of 1901, Russian commanders are empowered to destroy their prizes without distinction, under such exceptional circumstances as the bad condition or small value of the prize, risk of recapture, distance from Imperial ports or their blockade, and danger to the Russian cruiser, or to the success of her operations. That this is a modern innovation upon ancient practice, even in Russia, may be gathered from the maritime ordinance of Peter the Great, whereby a Russian commander was forbidden under pain of death, or some other almost equally severe penalty, to destroy his prizes on the high seas or to conduct them into foreign waters, unless it became necessary from dire necessity.

In the case of the United States, by the regulations issued in 1898, repeated in the Naval Code 1900, and now withdrawn in favour of the Naval Code 1904, which has not yet reached this country, where there are controlling reasons why the vessel may not be sent in, such as unseaworthiness, infectious disease, or lack of prize crew, it may in the last resort be destroyed. But if there

is imminent danger of recapture, the vessel may be destroyed, provided there is no doubt that she is good prize.

Undoubtedly we have here considerable confusion of thought. If there ought to be no doubt in the latter case, surely the same principle ought to apply in the former cases.

That the instructions issued by the French Government in 1870 expressly contemplated compensation to neutrals does not appear to strengthen Professor Holland's view. In fact, it might be claimed as proof against it. The refusal by the French prize court to award compensation to the neutral owners of property on board the two German merchantmen sunk during the Franco-German War hardly touches the point.

On the other hand, the English and Japanese regulations are entirely opposed to Professor Holland's view.

British commanders are instructed to release without ransom a vessel which is not in a condition to be sent in, or for which a prize crew cannot be spared, unless there is clear proof that she belongs to the enemy, in which case only are they authorized to destroy it.

By Articles 20 and 22 of the instructions issued in 1894, the Japanese commanders are authorized to destroy an enemy's vessels if unable to send them in, but if the vessel does not belong to the enemy, it must be released after having taken out articles contraband of war.

Municipal regulations, however, do not make international law. They may be indications of usage, but where they fail to conform to international law they may be disregarded. The English and Japanese regulations strongly support the view here endeavoured to be formulated.

Dr. Lawrence goes so far as to declare that the Russian view runs "counter to the opinion of the civilized world." This is clearly putting it too high. In the model Code des Prises prepared by the Institut de Droit International and approved at the Congresses of Turin, 1882, and Munich, 1883, no distinction is drawn between the destruction of enemy and neutral ships.

But on the other hand, at the Heidelberg Congress of 1887 this question was discussed at great length, with the result that the rule was confined to the destruction of enemy ships.

Professor C. N. Gregory, of Iowa University, also supports the Russian claim as being more just and reasonable than that of Sir William Scott. In his opinion a belligerent in case of necessity must have the right of destroying neutral property, provided the crew and ship's papers are preserved and the question of prize or no prize left to be adjudicated just as if the ship had been brought in.

In view of the fact that the Appeal Court of St. Petersburg has in the case of the German steamship "Thea," sunk under similar

circumstances to those of the "Knight Commander," reversed the decision of the Vladivostok prize court, upon the ground that it was unjustifiable, it seems not improbable that the result of the appeal of the latter vessel will have a similar result.

Of the "Oldhamia" we know nothing except that she was captured by the Baltic Fleet just prior to the battle of the Sea of Japan, her crew taken out, and the vessel stated to have been sunk.

The attitude then taken up by the late Unionist Government, if one may take Professor Holland as its spokesman, is illogical and suicidal. When belligerents, we are to instruct our commanders to release all ships unless they are absolutely certain they belong to the enemy; but when neutrals, we are to acquiesce in a declared policy of belligerents to sink our ships whenever it suits them, and take the chance of obtaining compensation if they make a mistake. If all foreign prize courts were above suspicion, and if Russian prize courts, in particular, were properly constituted, such acquiescence would still be dangerous. As matters stand, we are going out of our way to create a right which has no existence in the law of nations—viz., a right to destroy neutral ships and cargo without adjudication by a court of competent jurisdiction.

The Status of the Russian Volunteer Fleet.

Apart altogether from the question of the right of a belligerent to destroy a neutral vessel upon the high sea without adjudication in a court of competent jurisdiction, arises the question of the legal character of the cruisers belonging to the Russian Volunteer Fleet. The solution of this question is still to seek. Although the reluctance of the British Government to press for a satisfactory answer to this question under the then circumstances can be readily understood, to burke discussion which may lead to some definite result only renders the situation more dangerous. Driven from her warm-water ports in the Far East, Russia will naturally look for her outlet in the near East. The outlet from the Black Sea to the Mediterranean will certainly be one, and instead of being merely of convenience, as it was then, it has become of vital importance to her very existence as a sea Power.

Before dealing with the question in hand, it is desirable to pass in review the constitution of some of the volunteer navies of modern times.

During the Franco-German war, a Prussian decree of 24 July, 1870, authorized the creation of a volunteer navy. Owners of vessels were invited to fit them out for the purpose of attacking

French cruisers, large premiums being offered for their destruction. The crews were to be furnished by the owners, but were to be under naval discipline, and to serve under the Prussian flag; the officers were to be merchant seamen wearing the naval uniform and provided with temporary commissions. They were to take the oath to the Articles of War, but were not to be attached to nor form part of the regular navy.

Upon the protest of the French Government to Great Britain, the law officers of the Crown advised that there were substantial distinctions between the proposed naval volunteer force thus sanctioned and the system of privateering, which, under the designation of "la course," the Declaration of Paris was intended to suppress, and that as far as they could judge the vessels referred to would be to all intents and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the regular navy.

Mr. W. E. Hall disagreed with this view. In both cases he declared the armament was fitted out by private persons with a view to gain; in both the crews and officers were employed by them, and worked therefore primarily in their interests rather than in those of the nation at large. The limitation to the seizure of ships of war was accidental, and would have been withdrawn in the stress of war. Knowing her weakness at sea, Prussia had announced her determination not to attack French merchantmen, but France failing to reciprocate, this decree was cancelled.

The only real difference, says Mr. Hall, would have been that the volunteer cruisers would have been subject to naval discipline. Phillimore found it difficult to find any substantial difference from the old system of privateering. Bluntschli, it is true, appears to think that the fact of the Volunteer Fleet being under a general naval command would make a sufficient distinction, although he admits that even "la corsaire reconnaissait l'autorité de l'amiral commandant la flotte." Sir Henry Maine also considered that this project was not an evasion of the Declaration of Paris, but was perfectly legitimate.

But although these vessels were to be in the service of the Government, and to be subject to its orders transmitted through the Naval Department, since they were not to be attached to or to form part of the regular navy, it is difficult to see how they differed from privateers. Mr. Hall's conclusion would appear to be the better view, that unless a volunteer navy can be shown to be under the same control as the regular navy, it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris.

In this conclusion Mr. Hall is supported by Calvo, who is of opinion that such vessels are privateers of an aggravated character, as the owners were not required to give any security for their good conduct.

As the decree was never put into execution, the discussion was dropped. In France some of the great mail liners are commanded by a commissioned naval officer, but until the outbreak of war their service is strictly private and commercial. Until then they are not part of the navy, but immediately war is declared they are liable to be incorporated with the navy, converted into cruisers, and placed under naval discipline and control.

In Spain a similar system exists, with the addition that these mail boats carry in time of peace a certain amount of effective armament.

In Great Britain some of the leading steamship companies, in return for an annual subsidy, have constructed some of their liners so that they may the more readily be converted into swift light-armed cruisers, with an undertaking to place them at the disposal of the Government in the event of war, either by sale or on hire. Half the crews are to be drawn from the Naval Reserve, and the Admiralty reserve the right of placing on board fittings and other arrangements to facilitate the speedy conversion to cruisers in case of war.

The United States Government acquired similar rights over the vessels of the American Line in 1892. Germany subsidizes five of her largest and fastest Atlantic liners upon similar terms. When war threatend to take place between Great Britain and Russia in the winter of 1877–78, the latter Power accepted the offer of a patriotic association to create a Volunteer Fleet. The vessels were to be purchased by private subscription, and in the event of war to be handed over to the Government and commanded by naval officers.

This association survived the occasion of its origin. In return for an annual subsidy its vessels are retained permanently in the Imperial service, commanded by naval officers, and their crews subject to naval discipline. They are employed for both civil and military purposes—in the transport of convicts and of troops from the Black Sea ports to the Far East. They are also engaged in commerce—in the China tea trade more especially, and in ordinary passenger service. But in all cases in time of peace they sail under the commercial flag, since by the treaties of London, 1841, of Paris, 1856, of London, 1871, and of Berlin, 1878, the Dardanelles and the Bosphorus are, with certain exceptions which need not be considered here, closed to all ships of war.

What weight, then, is to be given to the commercial flag?

"Taking the circumstances as a whole," says Mr. Hall, "it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantly converted into public vessels of the State: they are properly to be considered as already belonging to the Imperial navy."

So long as these vessels are confined to the waters of the Black Sea no publicist would, it is suggested, be found to regard their incorporation into the Imperial navy as a violation of the Declaration of Paris. But they only obtained the sanction for their passage through the Dardanelles and the Bosphorus in their character of merchantmen, and after the commencement of the recent war with Japan they so passed through under the mercantile flag and, as it is alleged, with their guns in the holds.

If they were in fact public ships of war lawfully commissioned, they were committing a breach of the above-mentioned treaties. If they in fact passed through in their character of merchantmen, they were committing a breach of International Law.

The "Petersburg" and the "Smolensk" were two of the Black Sea Volunteer Fleet which under these circumstances passed through the Straits after the commencement of the war. The former in the month of May, 1904, stopped the P. and O. mail steamship "Malacca," and upon search found munitions of war on board. The "Malacca" was bound for a Japanese port. Upon these facts she was seized, and a prize crew put on board. The whole of the contraband, as it turned out, was the property of the British Government, which had been consigned to the British Admiral stationed at Hong-Kong. Upon the official communication of these facts to the Russian Government, the "Malacca" was released.

In the month of August the "Knight Commander," a British ship with American cargo, was sunk by the "Petersburg."

Confronted by the dilemma of admitting either a breach of the treaties or a breach of international law, Count Lamsdorff assured the British Government that the "Petersburg" and the "Smolensk" had sailed under "special commissions," which had been cancelled, and on 13 August, 1904, Mr. Balfour felt himself able to write to Sir Albert Rollit that "the Government had reason to know that no more ships to be used as cruisers would issue from the Black Sea, and that no more neutral ships would be sunk."

The assurance that no more neutral ships would be sunk signally failed. A number of vessels, English, German, and Dutch, suffered this drastic treatment, and in particular the British steamship "St. Hilda" was destroyed by the "Petersburg," which had become the "Dnieper." If the "Petersburg's" com-

mission had been cancelled as alleged, this was a mere act of piracy. If it was not cancelled, then the former question arises, did she sail from the Black Sea port as a public ship lawfully commissioned?

Belligerent rights can only be exercised by armed vessels commissioned by the authority of the State to which they belong. Such vessels must be either public ships of the regular navy or privateers. By the Declaration of Paris, Russia is precluded from employing privateers against any Power which is a party thereto or has given its adhesion. Japan had declared its adhesion.

We were told by Count Lamsdorff that the "Petersburg" and the "Smolensk" sailed under "special commissions," whatever that may mean. But they sailed under the mercantile flag; their armament was concealed; and by their conduct held themselves out to the world as private ships. In this character they were liable to all the disabilities of private ships. They were liable to proceedings *in rem* in any port at the suit of any private individual who had cause to complain of their action.

In international law the public character of a vessel is proved by her flag, the public commission, and the possession of the naval officer. The word of the officer is considered sufficient evidence at sea or in port, for fiscal or executive purposes, of her public character. No public vessel carries any other documents. No other proof of property in the sovereign is ever required.

If it is assumed that the volunteer cruisers were public armed vessels—and in view of the conditions under which they were incorporated in the regular navy it must be so assumed—did they become divested of their public character by their conduct, although sailing under a "special" or secret commission? It seems impossible to deny that they did so divest themselves. If they did, having once lost that character by their own voluntary act for the purposes of deception, can they, when their object has been achieved, re-invest themselves with that which they had openly abandoned? Are they not estopped by their own fraud?

This cannot be compared with the purchase of a vessel by a belligerent from a neutral, which is taken over on the high seas, converted into an armed ship, and commissioned on the spot.

Suppose the "Petersburg," whilst still under the mercantile flag, had committed some injury to a neutral ship, and upon entering a national port of such neutral had been seized and proceedings *in rem* taken against her, would the production of the "special commission" have been a good defence? If the judgments of Chief Justice Marshall in the "Exchange"[1] and of the Court of Appeal in the "Parlement Belge"[2] are to be accepted

[1] 7 Cranch, 116. [2] 5 Prob., 197.

as sound law, it is perfectly clear that the declaration of the commander of the "Petersburg" to the Turkish authorities that the vessel was a private ship would be conclusive evidence against such a defence.

"It seems very difficult," said Brett, L.J., "to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the 'Exchange.'"

Surely the converse is equally true. If the commander of a public ship, by his conduct and by his open declaration, admits his vessel is not a public vessel of war, that statement must be accepted, but it must be accepted once for all. He cannot be allowed to turn round and say when it suits his purpose, "It is true I declared my vessel not to be a public ship, but it was in fact so because I held a secret commission, and therefore I claim to exercise all the rights of a public ship." The plain answer to such a preposterous claim is that even a Russian ship cannot be at the same time both a public and private ship. The doctrine that a vessel may play fast and lose, put on and put off her public character as it suits her convenience, has no foundation in common sense or in international law. It has always been understood that a vessel retains the character in which she sailed until her return, unless her status is in the meanwhile changed by purchase, capture, or some other legal transfer.

This country had no desire to take any advantage of Russia's then embarrassments, but to acquiesce in breaches of treaties, of international law was to exhibit uncalled-for generosity. As Lord Lansdowne truly said on 10 August, 1904, an end ought to be put without delay to a condition of things so detrimental to the commerce of this country, so contrary to acknowledged principles of international law, and so intolerable to neutrals.

Two years have since passed, and we are back to the old position. Supported by Professsor Holland, Russia has renewed her claim to the right to sink neutral ships merely because it is difficult or impossible to bring them to a national port for adjudication. Lord Lansdowne, at any rate, does not believe in any such right, and it is time to vindicate what we, as the great mercantile Power, believe to be the principles of international law and usage. To wait for such vindication until Russia has regained her strength may be generous, but it is not politic.

Joint capture.—To the owner of captured property it matters little how the spoils of war are divided by the captors,

and whether the captors are joint or sole, privateers or public ships. To the captors, however, this question is all important, and the general principles guiding the distribution may be briefly noticed.

Being in sight.—It is not every circumstance of *being in sight* that is sufficient to entitle to a share.

"For," said Sir William Scott in the "Vryheid,"[1] "it is perfectly clear that being in sight in all cases is not sufficient. What is the real and true criterion? The being in sight or seeing the enemy's fleet accidentally a day or two before will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing or in preparations for chase or afterwards during its continuance. If a ship was detached in the sight of the enemy and under preparations for chase, I should have no hesitation in saying that she ought to share; but if she was sent away after the enemy had been descried, but before any preparations for chase or any hostile movements had taken place, I think it would be otherwise; there must be some actual contribution of endeavour as well as a general intention."

Privateers.—Since privateers are under no obligation to fight, a different principle has been applied in the case of joint capture. Where, therefore, a capture is joint, no right to share in the prize arises merely by being *in sight* at the time of the capture. There is no mere presumption to be drawn in their favour by their being *in sight*, that they had any intention of giving assistance or engaging in the fight. The *animus capiendi* must in their case be demonstrated by some overt act: there must be actual intimidation or actual or constructive assistance.

"It must be shown on the part of privateers," said Sir William Scott in the "Amitie,"[2] "that they were *constructively assisting*. The being in sight is not sufficient with respect to them to raise the presumption of co-operation in the capture. They clothe themselves with commissions of war from views of private advantage only. They are not bound to put their commissions in *use* on every discovery of an enemy. And therefore the law does not presume in their favour, from the mere circumstance of being in sight, that they were there with a design of contributing assistance and engaging in the contest. There must be the *animus capiendi* demonstrated by some overt act; by some variation of conduct which would not have taken place but with reference to that particular object. and if the intention of acting against the enemy had not been effectually entertained."

In the case of the "Santa Brigada,"[3] a Spanish galleon captured by a British cruiser, the claim to share as for a joint capture by a privateer was rejected by Sir William Scott.

"The *being in sight only*," said the learned judge, "will not be sufficient; it would open a door to very frequent and practicable frauds if by the

[1] 2 Rob., 16 (1799).
[2] 6 Rob., 261 (1806).
[3] 3 Rob., 52 (1800).

mere act of hanging on upon His Majesty's ships to pick up the crumbs of captures small privateers should be held to entitle themselves to an interest in the prize which the King's ships took. The sound doctrine of the Court has been that *the being in sight*, with respect to those two descriptions of vessels, is not sufficient to entitle the privateer to share. . . . It is argued, however, that she was eventually of service by diverting the attention of four Spanish frigates from the transaction of this valuable capture, and it is not improbable. But mere diversion of attention has never been held a sufficient ground for a title of joint capture; it is a mere casualty, totally unconnected with all merit, actual or constructive. If she had herself been captured it would have produced exactly the same effect in a still stronger degree, and yet it would have been perfectly ludicrous to have pronounced for her joint interest of capture under such circumstances."

The French practice may be gathered from the following articles of the *Règlement du 27 Janvier*, 1706:—

"I. Aucun ne pourra être admis au partage d'un vaisseau pris sur les ennemis, s'il n'a contribué à l'arrêter ou contracté société avec celui qui s'en est rendu maître.

"II. Celui qui prétend partager un vaisseau ne sera point censé avoir contribué à l'arrêter s'il n'a combattu, ou s'il n'a fait tel effort qu'en intimidant l'ennemi par sa présence, ou en lui coupant chemin et l'empêchant de s'échapper, il l'ait obligé à se rendre, sans qu'il lui suffice d'avoir été en vue, d'avoir donné chasse, lorsqu'il sera prouvé que cette chasse aura été inutile."

Public ships of war.—A different rule, as has been seen, has been applied to public ships of war. All such ships *being in sight* are deemed to be constructively assisting, and are therefore entitled to share in capture. The reason for this principle has already been stated. King's ships, said Sir William Scott in "La Flore,"[1]—

"are under a constant obligation to attack the enemy wherever seen; a neglect of duty is not to be presumed, and therefore from the mere circumstance of being in sight a presumption is sufficiently raised that *they* are there *animo capiendi*. In the case of privateers the same obligation does not exist. The law, therefore, does not give them the benefit of the same presumption."

The same rule is applied whether the actual captor is a privateer or a public ship,[2] though, as has been stated in the converse case, a privateer is not entitled to share from the mere circumstance of being in sight.[3]

Constructive assistance.—The definition of constructive assistance and the extent to which the principle should be applied were discussed in the "Vryheid."[4]

[1] 5 Rob., 268 (1804).
[2] The "Robert," 3 Rob., 194; "La Flore," 5 Rob., 268.
[3] The "Santa Brigada," 3 Rob., 152.
[4] 2 Rob., 16 (1799).

"The Act of Parliament and the Proclamation," said Sir William Scott, "give the benefit of prize 'to the takers,' by which term are naturally to be understood those who *actually take possession*, or those affording an actual contribution of endeavour to that event. Either of these persons are naturally included under the denomination *Takers*, but the courts of law have gone further, and have extended the term *Taker* to another description of persons—to those, who not having contributed actual service, are still supposed to have rendered *a constructive assistance*, either by conveying encouragement to the captor or intimidation to the enemy.

"Capture has, therefore, been divided into capture *de facto* and capture by construction: I need not say that the construction must be such as the Courts have already recognized, and not a new unauthorized construction; for as the word has already travelled a considerable way beyond the meaning of the Act of Parliament, the disposition of the Court will be, not to extend it still further, but to narrow it and bring it nearer to the terms of the Act than has been done in some former cases."

In the "Odin"[1] there was undoubtedly an offer by the captain of a privateer to assist the captain of a king's ship to effect a capture, followed up by an attempt on the part of the former to join in the actual capture. A cutter was sent from the privateer with this object, but before it could come up with the prize, a boat's crew of the king's ship had gained possession, and refused to let the officer of the cutter come on board.

It was certainly the intention of the privateer to give all assistance in its power. But, said Sir William Scott,

"something more is necessary to be established. It must be shown that some assistance was effectually given, and in conjunction with the actual captor."

An exception to the rule of *being in sight* is found in the case of a capture made by part of a squadron. In the case of the "Forsigheid,"[2] the actual capture was made by some ships forming part of the squadron which were employed in the blockade of the Texel, but which were *out of sight* of the fleet at the time of the capture.

"In case of ships associated together by public authority," said Sir William Scott, "the same principle does not apply. It will not be denied that if one ship of a squadron takes a prize in the night unknown to the rest it would entitle the whole fleet to share, although possibly the capture might have been made at a distance out of sight of most of the ships of war, even if it had been noonday, for the fleet so associated is considered as one body unless detached by orders, or entirely separated by accident, and what is done by one continuing to compose, *in fact*, a part of the fleet, enures to the benefit of all."

Another exception to the rule of being in sight is where there is a joint chase, without any common co-operation, but each

[1] 4 Rob., 318 (1803).
[2] 3 Rob., 311 (1801).

party acting separately, although with a common object, one of the parties, owing to the darkness of the night or some other circumstance, loses sight of the enemy.

In the case of "Le Niemen,"[1] the British frigates "Amethyst" and "Emerald" were cruising in company but without co-operation, for French vessels, when the "Amethyst" sighted a French frigate, "Le Niemen," and went in chase of her. The "Emerald" having soon afterwards sighted the strange sail, and the "Amethyst" in pursuit, joined in the chase, but when night came on and the chase was lost in the darkness, in the expectation that it would resume its original course, the "Emerald" changed her course in order to intercept it. The following day the "Amethyst" came up with "Le Niemen" and a severe engagement ensued. Whilst both frigates were lying in a disabled condition, unable to renew the fight, the British cruiser "Arethusa" made her appearance, and to her "Le Niemen" surrendered. The "Emerald" subsequently came up also.

In rejecting the claim of the "Emerald" to share as joint captor, Sir William Scott said:—

"It is only derivately through the 'Amethyst' that she (the 'Emerald') can sustain any claim as against the 'Arethusa,' and this species of claim the Court would not be much disposed to maintain when there was such an entire absence of co-operation. It is said, however, that the 'Emerald' must be considered as acting in conjunction with the 'Amethyst.' The grounds upon which she could by any possibility have been entitled against the 'Amethyst' are, that she had joined in the pursuit of the prize the day before the capture, and had not discontinued the chase. It is, I think, to be collected from the evidence that the 'Emerald' had seen the prize the day before and had used her best exertions to co-operate, but night comes on and she necessarily loses sight of the enemy. It does not appear that there was any particular concert between these two vessels, or any authority directing a co-operation between them. The signals that were made did not convey any instructions as to the courses proper to be pursued; there was no common co-operation except such as the discretion of two parties acting separately with a common object in view might produce. I do not mean to say that it is necessary that the two ships should have pursued the enemy in precisely the same line; it certainly is not necessary to constitute a unity of chase that vessels should sail in the same or even in a parallel direction. If one vessel should sail in one direction and the other in another, with the purpose of capturing, that difference of course would not necessarily defeat unity of purpose; if in sight certainly not. I accede to the observation of the counsel for the party claiming as joint captor, that a pursuit in parallel or even opposite lines would not of necessity defeat unity of operation. What the fact may have been with respect to the 'Amethyst' is not clearly established; it is not, however, inconsistent, as far as I can judge, with anything in the evidence, that she might, even

[1] 1 Dod., 9 (1811).

during the night, have retained some glimpse of this vessel which had been the object of their common pursuit. The 'Emerald' certainly had no sight, but was left to her own speculation as to what course the enemy would take during the darkness of the night in order to elude her pursuers and to withdraw herself from the probability of falling in with either of them. Why, then, what was the 'Emerald' doing at this time? I think *cruising merely in search*. It became matter of mere conjecture what the course of the enemy might be, and the 'Emerald,' it turns out, was unfortunate in her conjectures. The truth is she never came up to the place of action or near to it; she merely saw the lights and a rocket, which do not appear in the slightest degree to have influenced her conduct. She had no knowledge of the engagement; she neither saw the flashes nor heard the report of the guns; and every step she took was carrying her away from the object of her pursuit, if pursuit it can be called. I am not aware of any case on which a claim of joint capture has been supported on reasons like these. Here was, it is true, an *animus persequendi*, but here was likewise an erroneous course; and in consequence of that the benefit, and I may add the burden, of the contest has been thrown on the 'Amethyst.' It was a speculation, I will not say unwisely, undertaken by the 'Emerald,' but which has certainly terminated inauspiciously for her interest. The case of continued joint chasing is not made out; what is proved is an office of a similar but inferior kind—it is *going in search*, and not *in pursuit*. I know of no case in which it has been held that a ship beginning a chase and then discontinuing it (for it is a discontinuance to change a course upon conjecture), is entitled to share as a joint captor."

The facts in the "Financier"[1] were very similar. It was held here that one of two joint chasers being ordered to pick up the boats of the other, and in consequence of the delay occasioned by her obedience to such orders losing sight of the prize, is not entitled to share with a third ship which comes up and makes the actual capture.

The joint chasers were the "Britomart" and the "Quebec." The former, in carrying out the orders of the latter, lost sight both of the enemy and of the "Quebec." But for the interception of the "Desiré," the prize would have escaped into the Texel.

"If," said Sir William Scott, "the 'Britomart' continued the chase of any ship, it must have been of the 'Quebec,' and of that she had entirely lost sight; the pursuit even of that ship cannot properly be denominated a chase; it was a conjectural pursuit only; it was a feeling about in the dark, a search and inquiry, but no chase. The chase of the prize by the 'Britomart' must be held to have ceased at six or seven o'clock on the evening before the capture, when she was employed in picking up the boats of the 'Quebec,' after which time she never again got sight of the prize. Then by what possibility can the 'Britomart' be considered a joint chaser? The actual chase—that is, the chase by the ship which actually effected the capture—did not commence till long after the 'Britomart' had

[1] Dod., 61 (1811).

discontinued pursuit. In this second and effectual chase she did not in any manner co-operate; she neither saw the chaser nor the chased, and had no participation whatever in the transaction. On what principle, then, can it be contended that she is entitled to share by virtue of the former chase with the 'Quebec'? The 'Quebec' is herself only a constructive captor; and to let in another ship merely because she had joined in a previous chase with a constructive captor to share with an actual captor is, in itself, an indulgent construction of the law, which must not be further extended. . . . It appears to me that there was no contribution of assistance either actual or virtual. In point of fact, not any actual chase; in point of principle, neither encouragement of the friend nor intimidation of the enemy."

The mere diverting the course of the enemy so as to throw her into the hands of another chaser is not of itself sufficient to raise a claim as joint captor. The expenses, however, of the "Britomart" were directed to be paid. A similar claim was made in "Le Niemen,"[1] and rejected.

"I am not," said Sir William Scott, "aware of any such principle. It appears to me to be perfectly novel; that it is capable of being abused to a very considerable extent the cases which have been mentioned I think clearly prove. Among the instances enumerated by the counsel is that of the chase of the French fleet by Lord Nelson when he pursued it to the West Indies and back, and drove it into the lap of Admiral Calder.

"Another case pointed out is that of the four French ships flying from Trafalgar and afterwards captured by Sir Richard Strachan. A third instance was that of an enemy's ship, crippled and left by a British frigate with which she had an action, in a disabled state, and afterwards taken possession of by a ship accidentally arriving on the spot. In none of these cases was it ever pretended that any but the actual captors were entitled to share. It would indeed be a monstrous position that every fleet or ship which, either by accident or design, diverts the course of an enemy, and by so doing occasions her capture by a totally distinct force, should be considered a joint captor."

But where one party continues the chase in a proper direction, and owing to the darkness of the night or a fog she is not in sight at the time of capture, this circumstance will not universally exclude her from a right to share. In the "Union,"[2] the "Andromache," which had joined in the chase of the "Union" by the "Iris," persisted in the pursuit in spite of the fog and the night, in consequence of which she lost sight of both vessels. At the time of the capture she was not more than three miles off, although owing to the fog and darkness she could not be seen by those on board the "Iris" or the prize.

"I am clearly of opinion," said Sir William Scott, "that upon this statement the ships would be entitled to share as joint captors, because if they were prevented seeing solely by the fog and darkness of the night, that

[1] 1 Dod., p. 17. [2] *Ibid.*, 346 (1813).

circumstance would not be sufficient to bar them of a right to which they would otherwise have been entitled. It is certainly true that darkness preventing sight will not universally exclude from a right to share, nor can the rule be laid down universally the other way; for there may not, in every case, be evidence to show proximity to the scene of action. But where it can be shown that the asserted joint captor was in sight when the darkness came on, that it continued steering the same course by which it was nearing the prize, and that the prize itself also continued the same course, it amounts to demonstration that the ships would have seen and been seen by each other if darkness had not intervened."

Antecedent or subsequent services.—Upon the capture of the Spanish settlement of Buenos Ayres,[1] a claim of joint capture was made by the "Leda," which had been sent to obtain information before any decision had been resolved upon to attack the settlement, and which left Buenos Ayres before the arrival of the fleet, and only returned six days after the capture.

"The question is," said Sir William Scott, "whether upon any general principle the services antecedently performed by the 'Leda' are of a nature to give her an interest in the capture. I am of opinion that they are not; that the services previously performed by her, however meritorious they may have been, will not entitle her to share, since there was no preconcert and no specific knowledge of the expedition till after the capture was effected. Upon any general principle of joint capture or on the authority of decided cases, I am clearly of opinion that the claim of the 'Leda' cannot be established; and it certainly is not the disposition of this Court or of the Lords Commissioners of Appeal to extend the interests of joint capture beyond their present limits. So likewise with respect to services subsequently performed; they must be considered precisely in the same light. I think I may lay it down as a certain and fixed rule that no services, antecedent or subsequent, unless the vessel is employed in the identical service of the expedition, will impart a prize interest."

Tenders.—A public ship is entitled to share in all the captures made by a tender attached to her, whatever the distance may be which separates them at the time of the capture. "The claim for the king's ship is given," said Sir William Scott in the "Charlotte,"[2]

"in virtue of a seizure said to be made by this vessel *as a tender;* and in order to support that averment it must be shown, either that there has been some express designation of her in that character by orders of the Admiralty, or that there has been a constant employment and occupation in a manner peculiar to tenders and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable."

As the "Charlotte" did not comply with either of these requisites, and as the master was not on board, the legal interest

[1] 1 Dod., 28 (1811).
[2] 5 Rob., 281 (1804).

did not enure to the private captors under this commission, but was condemned as a droit of Admiralty, taken by non-commissioned captors.

In the case of the "Carl,"[1] the tender "Avon" was proved to be attached to the "Impregnable" by a letter from the Admiralty.

"It is quite clear," said Dr. Lushington, "that the 'Avon' had all the requisites mentioned in this judgment [Sir William Scott's]. There is an express designation of her as tender, and there is a constant employment of her in that capacity. Under such circumstances, I apprehend that the tender becomes, as has been contended in law, a part of the ship to which she has been attached, and that any capture made by her enures to the benefit of the ship to which the tender is an adjunct. This was the old rule and practice, and must prevail unless any distinction can now be shown."

The tender in this case not being commissioned, Dr. Lushington held that the prize must have been condemned as a droit of Admiralty, unless the capture were considered as made by the vessel to which the tender was attached.

Ship's boats.—The same principle applies in the case of captures made by a ship's boats. Thus, where a boat despatched from a ship makes a capture, this enures to the benefit of the whole ship, and not merely to the boat's crew.

But constructive assistance by boats founded upon the mere circumstance of *being in sight* will not support a claim even for the boat's crew, and much less for the ship to which it is attached.

"There is, I think," said Sir William Scott in the "Odin,"[2] "a very solid ground of distinction between the claims of a boat in the different cases of an actual and a constructive capture. Where a boat actually takes, the ship to which it belongs has done by means of this boat all that it could have done by the direct use of its own force. In the case of mere constructive capture, the construction which is laid upon the supposed intimidation of the enemy and the encouragement of the friend, from a *ship of war* being *seen* or *within sight* of a capture applies very weakly to the case of a boat—an object that attracts little notice upon the water, and whose character, even if discovered by either of the other parties, may be totally unknown to both—more unreasonable still would this be upon the actual captors, if the *constructive* co-operation of such an object would give an interest to the *entire ship* to which it belonged. When a ship is in sight she is conceived to co-operate in the proportion of her force: but what room is there for such a presumption when she co-operates only by the force of her boat?

"I am not in possession of any case in which a boat without any actual assistance or previous concert has been held from *being in sight* only, to be entitled to share as a joint captor even to the extent of the persons actually composing the boat's crew; much less to establish a claim of joint capture for the whole ship to which the boat belongs. I have not been

[1] Spinks, 238 (1855).
[2] 4 Rob., 318 (1803).

able to find any precedent to that effect; nor has any been produced by the counsel in consequence of the inquiry which I directed to be made. Extremely different in principle is such a case from the case of two ships, on the grounds which I have already stated."

The circumstances in the case of the "Nancy,"[1] decided by the Lords of Appeal, were even stronger. The boat's crew of the "Royal Admiral" came up *very soon* after the boat of the "Trusty" and *were admitted on board* the prize, which was not the case in the "Odin," and did actually render assistance by navigating the prize into port and bringing her to anchor in the harbour of St. Helena; and further, that the "Royal Admiral" and the "Trusty" were lying at anchor at St. Helena, and were *within sight and seen by* the officers and crew of the "Nancy" at the time of the capture. Nevertheless, the Lords of Appeal rejected the claim of the "Trusty" to participate, as its allegations were not sufficient in law to support the demand.

"Constructive assistance by boats," said Sir William Scott in "La Belle Coquette,"[2] "cannot entitle the ships to which they belong to share in the prize. The actual capture by the boats would be sufficient for that purpose, for they are a part of the force of the ship. But in cases of mere constructive assistance, the right of participation must be in proportion to the quantum of intimidation caused, and cannot go beyond the force actually seen by the enemy. How far the seamen composing the crews of these boats were provided with the means of subduing a vessel of this force does not appear; we all know the active valour of that class of men in finding expedients under all possible circumstances, and I presume that they had arms of some description or other with them. But how stand the facts of the case, as disclosed by the evidence?

"Four boats belonging to the 'Tonnant' are despatched in search of the enemy; they are supported by two schooners, one of which formed a part of the original squadron, and the other, though it happened by accident only to be on the spot, yet by the practice of the navy became subject for the time to the orders of the Admiral. The boats, however, were under the necessity of returning many hours before the capture took place, being unable to proceed on account of the wind and weather; not, as happened in the case the other day before the Court of Appeal, when one vessel quitted merely because she saw the other was of sufficient force to ensure the capture without assistance. It is clear, therefore, that they are in no way to be considered the actual captors; they can convey no interest to the ship, and they are themselves not entitled upon the ground of constructive assistance, since they relinquished the chase and returned to the harbour before the capture took place. The case, then, is reduced to this, that one of these boats put some of her men on board the actual captor, and as part of the crew *pro tempore* of that ship they are entitled to share, but not as part of the crew of the 'Tonnant.' The claim of these men is admitted; but I have no hesitation in deciding that those who remained in the boats of the 'Tonnant' are not entitled to share, and a fortiori that the 'Tonnant' herself can have no interest in this capture."

[1] 4 Rob., 327 n. (1803). [2] 1 Dod., 18 (1811).

But if a boat is detached from the ship to which she belongs and attached to another, her own ship is not entitled to participate in the prize.

The "Melomane"[1] was captured by the cutter "Assistance," to which had been attached a boat from the cruiser "Dragon," the actual seizure being made by the boat's crew of the "Dragon."

Was the boat acting as the boat of the "Dragon" or not? asked Sir William Scott.

"The tenor of all the evidence inclines me to think," answered the learned judge, "that she *was not;* that she had been *detached* from the 'Dragon' and *attached* to the 'Assistance' cutter, and that she was employed in performing the same services for the cutter as she would have performed for her own ship. If that is to be taken as a correct view of her situation, I cannot but accede to what has been said in argument, that a boat so *detached from one* and *attached to another* must be taken as acting under the authority, and for the benefit of, the ship to which *at that time*, and in those operations, she *more properly belongs.* The fact appears to me to be, as it is described by the witnesses of the captured ship, 'that the capture was actually and effectually made by the "Assistance" cutter, and that the boat was only used to perform such acts as would in the ordinary course of service have been performed by the cutter's own boat.'"

Transports.—Mere association with a fleet or an army, without any direct or immediate employment in military operations, is not sufficient to entitle transports to participate as joint captors. In the operations which led to the capture of the Cape of Good Hope[2] from the Dutch, a number of East Indiamen were employed to transport troops to that port. It was alleged that their appearance disconcerted the enemy, and prevented them from making an attack upon the English camp, which they were on the point of attempting. It was consequently claimed that this became a case not merely of *constructive service* but of *actual assistance.*

"The greatest part of the naval operations," said Sir William Scott, "had been performed before the arrival of these ships, and there appears to have been only one particular piece of military service performed on the part of the navy after their arrival, and on which only one of these ships was employed: *that vessel will undoubtedly be allowed to share.* As to the rest, although it must be admitted on all sides that the East India Company have performed services in respect of this expedition which may entitle them to the thanks of their country, yet the question of legal merit whether they are entitled to share in the proceeds of this prize will depend on very different considerations. It is not stated in what way the agreement was made with these ships, whether it was to act in a military capacity or not. If it was to act in a military character, that might nearly decide the question. But nothing is said on this subject in the plea, and

[1] 5 Rob., 41 (1803). [2] 2 Rob., 274 (1799).

therefore I must infer that no such ground of pretension could be sustained. All that is said is, 'that they carried out General Clarke and his troops.' It is perfectly clear that at the time of leaving the coast of Brazil it was perfectly unknown to these ships for what attack these troops were conveying: whether by virtue of their contract they were to stay at any place, or come away after the troops were landed at such place, is wrapped in complete silence, and therefore, for want of any more particular description, I can look only to their general character, which is that of merchant vessels commissioned against the *French*, but having no commission against that enemy who was the particular object of this expedition; whatever their force may have been, I do not see that they can be considered in their original character as more than transport vessels, liable to be called upon occasionally to act with alacrity and vigour (for British vessels of any character are liable to be called upon on extraordinary occasions of public necessity), but not deriving from that circumstance, as far as this expedition was concerned, any title to invest them with military character; for the mere conveyance of troops would have no such effect. At the same time, it is true that a military character might be afterwards impressed upon them by the nature and course of their subsequent employment. If they could have been associated to act in conjunction with the King's fleet, and did so act, they may acquire an interest which on proper application will be sure to meet with due attention. The question for me to consider, then, will be whether they have acquired that military character or not. Their pretensions have been put on several grounds: it is first said that they were associated with the fleet; mere association will not do—the plea must go farther and show in what capacity they were associated, and that capacity must be directly military. Transports are associated with fleets and armies for various purposes, connected with or subservient to the military uses of those fleets and armies. But if they are transports merely, and as such are employed simply in the transportation of stores or men, they do not rise above their proper mercantile character in consequence of such an employment. The employment must be that of an immediate application to the purposes of direct military operations, in which they are to take part.

"It is placed on the ground of intimidation, and it is said that when the enemy is *proved* to have been intimidated, when it is not matter of inference but of *actual proof*, the assistance arising from intimidation is not to be considered as constructive merely, but an actual and effective co-operation. But I take that to be not quite correct, for a hundred instances might be mentioned in which actual intimidation might be produced without any co-operation having been given. Suppose the case of a small frigate going to attack an enemy's vessel, and four or five large merchant ships unconscious of the transaction should appear in sight, they might be objects of terror to the enemy, but no one would say that such a terror would entitle them to share; though the fact of terror was ever so strongly proved, there would not be that co-operation nor that active assistance which the law requires to entitle non-commissioned vessels to be considered as joint captors. What is the intimidation alleged? 'That the Dutch forces were about to make an attack on the British army, but on the appearance of these fourteen ships desisted.' This was an intimidation of which the ships were totally unconscious, and which would have been just as effectually produced by a fleet of mere transports; and I see no

principle on which I could pronounce these ships entitled on which I should not be also obliged to pronounce any fleet of merchantmen entitled in a similar situation; for any number of large ships known to be British, and not known to be merchantmen, would have produced the same effect. The intimidation was entirely passive; there was no *animus* nor design on their part, nor even knowledge of the fact, for it was not till the next day, when their commodore returned from Lord Keith, that they knew anything of the matter, or even thought of the terror they had assisted in exciting. I take it that no case can be alleged in which a terror so excited has been held to enure to the benefit of a non-commissioned ship. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy. That it is a case of assistance, analogous to that of joint chasing, on which it is said to be sufficient if the non-commissioned ship puts itself in motion; and the case of the 'Twee Gesuster'[1] in the last war and the 'Le Franc'[2] have been relied upon. I see no ground on which the analogy can be supported. The cases cited were of a very different nature; in both of them the non-commissioned ships chased *animo capiendi*, and contributed materially, in the case of the 'Le Franc' directly and immediately, to the act of capture. In the present case these ships approached, but with no *animus capiendi*, with no hostile purpose entertained by themselves, for they were totally ignorant of the objects of the expedition. It is, moreover, obvious to remark that all cases of joint chasing at sea differ materially from the cases of conjunct operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea, there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained and much intimidation may be produced; but in cases of conjunct operations at land it is not the mere intrusion even of a commissioned ship that would entitle parties to shares. The words of the Act of Parliament direct 'That in all conjunct expeditions of the navy and army against any fortress upon the land directed by instructions from His Majesty, the flag and general officers and commanders and other officers, seamen, marines, and soldiers shall have such proportionable interest and property as His Majesty under his sign manual shall think fit to order and direct.' The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine that private ships of war, by watching an opportunity and intruding themselves into an expedition which the public authority had in no degree committed to them, should be at liberty to say 'we *will* co-operate,' and that they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally entrusted. Expeditions of this kind, designed by the immediate authority of the State, belong exclusively to its own instruments whom it has selected for the purpose, and it might be attended with very grave obstruction to the public service of the country if private individuals could intrude themselves into such undertakings uninvited and under colour of their letter of

[1] 2 Rob., 284 n.

[2] *Ibid.*, 285 n. In both these cases it was held on appeal that the prizes had been captured by commissioned and non-commissioned ships, and that the shares which would have been taken by the latter if they had been commissioned became droits and perquisites of Admiralty.

marque. I think, therefore, that the cases of chasing at sea and of conjunct operations at land stand on different principles, and that there is little analogy which can make them clearly applicable to each other. . . . Upon the whole of these facts . . . it has not been shown that these ships set out in an original military character, or that any military character has been subsequently impressed upon them by the nature and course of their employment; and, therefore, however meritorious their services may have been, and however entitled they may be to the gratitude of their country, it will not entitle them to share in this valuable capture."

Where ships are associated in the same service, or engaged in a joint enterprise under the orders of the same superior officer, they are usually entitled to share in each other's prizes made in such service or enterprise.

Different principles apply to the cases of ships associated by public authority on a common service and ships not so associated.

"In the latter case," said Sir William Scott in the "Forsigheid,"[1] "where a capture is made by ships not associated by public authority for a common service, it could not be maintained on any principle that the mere circumstance of being within such a distance as would bring them within sight in clear weather would entitle them to share when in fact they *were not seen* at all. It would put this rule of law on a very uncertain footing indeed, unconnected with all rational principle as well as incapable of all satisfactory proof, if the Court had to determine on the state of the atmosphere and on the loose conjectural evidence that might be applied to ascertain such a state; whether the distance for sight, if the weather had been clear; and what under such a state could be the impression on the mind of the enemy or the friend. It is essentially necessary in such cases that the party should have *been in sight* at some part of the transaction, though it is not required that it should be at the moment of capture, because the impulse and impression on the mind of the enemy who is to be intimidated or of the friend who is to be encouraged may remain notwithstanding the intervention of a headland or fog, and may therefore bring it within the reach of that principle of law on which constructive assistance is built.

"But in cases of ships associated together by public authority the same principle does not necessarily apply. It will not be denied that if one ship of a squadron takes a prize in the night unknown to the rest, it would entitle the whole fleet to share, although possibly the capture might have been made at a distance out of sight of most of the ships of war, even if it had been noonday; for the fleet so associated is considered as one body, unless detached by orders or entirely separated by accident; and what is done by one continuing to compose *in fact* a part of a fleet enures to the benefit of all. In the present case no accidental separation is suggested. The only question is whether or not the capture was made whilst those ships composed *de facto* a part of this fleet.

"The whole case, then, is reduced to this point: whether these ships are to be considered as detached or not—*detached*, I mean, in the same manner as detachments are usually made, *for some distinct and separate purpose*, which, though possibly connected with the main service, carries them out of the scene of common operation for the time, or whether they were sent

[1] 3 Rob., 311 (1801).

only on the look out to preserve their connexion with the service of the fleet and maintain their dependence on it? To determine this question I must look to the orders that were given: they direct them 'to watch well the motions of the enemy, to cruise between certain points, joining the fleet occasionally for communication.' If they stopped here, I should be inclined to hold that it was a separate service, with order to join again; but they go on—'directing them to avoid being at such a distance *as not to observe the signals that were made.*' It is impossible under these terms to say that it was a detached service. It is more like the stretching out of the arms of the fleet, without dissolving in any manner the connexion between them and the main body. From this very circumstance a presumption strongly arises, were it necessary to consider the probability of that fact, that the fleet would *have been actually in sight* if an accidental haziness had not intervened. On the whole of the case contained in this allegation, I am of opinion that the fleet is entitled to share, and on the same principle by which it would have shared in a capture made by one of its own ships not sent off under such an order."

Conjunct military and naval expeditions.—Apart from municipal law, a mere general co-operation of land and sea forces in the same general object is not sufficient to give to either force a title to participate in the prizes made by the other. In order to entitle them to share in such prizes there must be actual co-operation.

"Much more is necessary than a mere *being in sight*," said Sir William Scott in the "Dordrecht,"[1] "to entitle an army to share jointly with the navy in the capture of an enemy's fleet. The mere presence or being in sight of different parties of a naval force is, with few exceptions, sufficient to entitle them to be joint captors, because they are always conceived to have that privity of purpose which may constitute a community of interests; but between land and sea forces, acting independently of each other and for different purposes, there can be no such privity presumed; and, therefore, to establish a claim of joint capture between them there must be a contribution of *actual assistance*, and the mere presence or being in sight will not be sufficient. . . . When there is no preconcert, it must be not a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very *material service* that will be deemed necessary to entitle an army to the benefit of joint capture. When there is preconcert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him, and whether that is important or not, it is not so material; the part is performed, and that is all that is expected. But where there is no such privity of design, and where one of the parties is of force equal to the work and does not ask assistance, it is not the interposing of a slight aid, insignificant, perhaps, and not necessary, that will entitle another party to share. Suppose an engagement at sea, in which a part of the enemy's crews, being disposed to fly to shore, should be prevented from landing by an armed force, and should therefore be induced to surrender with the main fleet; or suppose this body of armed men on shore should have prevented the fleet from obtaining supplies two or three days previous to the action,

[1] 2 Rob., 55 (1799).

these would be very remote services, and such as would not induce me to pronounce for a joint capture. The services which I should require must be such as were directly or materially influencing the capture, so that the capture could not have been made without such assistance, or at least *not certainly* and without great hazard. It is further expected that the evidence by which such a claim is supported should be clear and consistent, because it lies on those setting up an interest of joint capture to make out their case; the presumption is on the side of the actual captor. Their evidence, therefore, must be satisfactory, for if not, or if it is left at all doubtful, it is the duty of the Court to adhere to the interests of the actual captor."

The same principle was applied by the Supreme Court of the United States in Oakes *v.* United States.[1] In this case the "Eastport," during the Civil War, was captured whilst waterborne by detachments of men in small boats from three United States gunboats, commanded by a lieutenant in the navy, part of the naval forces under the command of a naval captain. At the time of the capture no land forces were near the scene thereof or took any active part therein; but the gunboats and naval forces in the inland waters, where the prize was lying, were under the control of the War Department. It was accordingly held that the capture was made not by the army, but by the naval forces, although the cutters at the time and place were under the general control of the War Department.

In the case of the "Stella del Norte,"[2] a squadron was detached from the British fleet to act in concert with the Austrian army on the coast of Genoa, for the purpose of driving the French forces out of that country. The "Stella del Norte" and other vessels were captured by ships of the squadron coasting along the shore, in co-operation with the Austrian troops, after the latter had driven away the garrison from a battery, under the protection of which these vessels had been lying.

This was held not a conjunct expedition within the purview of the Prize Act.

"As far as the particulars of the case may be taken to be distinctly stated in the allegation," said Sir William Scott, "it is a conjunct expedition of a much wider range; it is a case of an army sweeping the shore and of a fleet sailing along the coast, not pressing on any particular point, but both going on progressively against a whole country. It is therefore materially different from ordinary cases in this particular circumstance, that it is not easy to conceive objects of booty or prize, as to which there could be any privity or co-operation between them. Suppose the case of a Russian army landed in France and supported, as far as it was capable of receiving assistance, by an English fleet upon the coast. Though a general purpose of concert and assistance might subsist between them, there would be many acts and many situations in which

[1] 174 U.S. Rep., 778 (1898).
[2] 5 Rob., 349 (1805).

there could be no possibility of co-operation. If the army moved ever so little into the interior with a view of concentrating its force or of taking a more advantageous position, any booty taken in such a course would be a capture, towards which scarcely any privity or communication of endeavour could subsist between the two forces, in comparison with other cases of co-operation, pointing to one particular and identical object. So on the other side, whilst the army was ever so little retired, a capture made by the fleet of any ships appearing on the coast must be an act in which the army could have very little participation."

By the Prize Act, 1864,[1] to entitle naval and military forces to participate, first such forces must be those of His Majesty, and secondly its provisions point particularly to expeditions against some fortress on land which is accessible by land and sea, against which both descriptions of forces are capable of concurring in one identical operation or series of operations.

In the United States of America, in the case of joint capture by military and naval forces, since no Act exists giving prize to the latter in such a case, the capture enures exclusively to the benefit of the Government.

In the "Siren,"[2] Mr. Justice Swayne said:—

"In our jurisprudence there are, strictly speaking, no droits of Admiralty. The United States have succeeded to the rights of the Crown [i.e. the English Crown]. No one can have any right or interest in any prize except by grant or permission. All captures made without their express authority enure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an Act of Congress must be shown. If no such Act can be produced, the alleged right does not exist. The United States takes the captured property not as droits, but strictly and solely *jure reipublicæ*.

"Four Acts of Congress," continued the learned judge, "have been passed allowing captors to participate in the fruits of the property captured. They are the Act of 1799,[3] that of 1800,[4] that of 1862,[5] and that of 1864.[6] It is necessary in this case to consider only one clause of the tenth section of the Act last mentioned, which is as follows: 'The net proceeds of all property condemned as prize, when the prize was of superior or equal force to the vessel or vessels making the capture, shall be decreed to the captors. And when of inferior force, one-half shall be decreed to the United States, and the other half to the captors.'

"No provision is found in any of these statutes touching joint captures by the army and navy. They are wholly silent as to the military arm of the service. It results from this state of things, according to the principles we have laid down, that such captures enure exclusively to the benefit of the United States."

[1] Sect. 34 of 27 & 28 Vict. c. 25.
[2] 13 Wall., 389 (1871).
[3] U.S. Statutes at Large, Vol. I, 715.
[4] *Ibid.*, Vol. II, 52.
[5] *Ibid.*, Vol. XII, 606.
[6] *Ibid.*, Vol. XIII, 306.

It was said in Porter *v.* United States:—[1]

"Prize-money or bounty in lieu of it is not allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy with the co-operation of the army. To win either, the navy must achieve its success without the direct aid of the army by maritime force only. No pecuniary reward is conferred for anything taken or destroyed by the navy when it acts in conjunction with the army in the capture of a fortified position of the enemy, though the meritorious services and gallant conduct of its officers and men may justly entitle them to honourable mention in the history of the country."

Proof of joint claim.—The burden of proof lies upon the party setting up a claim of joint capture.

"The Act of Parliament," said Sir William Scott in the "Robert,"[2] "has been extended, for the purpose of preserving the harmony of the service, to let in some remote claims; but the facts must be proved in the most direct manner."

Distribution of proceeds of prize.—Apart from municipal regulations, the proceeds of prize are distributed amongst joint captors in proportion either to the numbers of their respective crews, or of their respective guns, or of both in combination.

In the case of Roberts *v.* Hartley,[3] Lord Mansfield, on the authority of a case tried before him at the "Cockpit," held that where there had been no special proportion of distribution agreed upon the division should be made according to the number of men on board each ship. Both the captors were privateers.

This principle was also applied in the case of the "Twee Gesuster,"[4] where the capture was made by two cutters, each manned by a crew of sixteen men. Here one was commissioned and the other not. One half-share was decreed to the commissioned vessel, and the other half, which would have gone to the non-commissioned vessel if she had held a letter of marque, was condemned as a droit of Admiralty. The same rule was followed in "Le Franc."[5]

Subsequently, in the case of Duckworth *v.* Tucker,[6] Lord Mansfield said the rule of the law of nations had never yet been stated,

"but if one might guess at it, it must be in the ratio of the strength of the respective captors; to know which the number of guns, weight of metal, number of men and strength of each fleet must be stated."

Story, however, preferred the principle of distribution according to the number of men, without whom the instruments of war would be useless.

[1] 106 U.S. Rep., 607 (1882).
[2] 3 Rob., 194 (1800).
[3] 1 Doug., 311 (1780).
[4] 2 Rob., 284 note.
[5] *Ibid.*, 285 note.
[6] 2 Taunt., 7 (1809).

"Upon general principles," observed this learned judge in the "Despatch,"[1] "it would seem reasonable, in cases of joint capture, that the distribution should be made according to the relative strength of the capturing ships. In that proportion the intimidation of the enemy, which would lead to a surrender, would ordinarily be supposed to exist where no battle should be actually fought, and in cases of actual battle the degree of injury done to the enemy would be estimated in the same manner. And in a middle class of cases, where one ship was actually engaged and the other only in general co-operation, the ultimate surrender might be well attributed as much to the despair of escape from the combined force as the immediate injury from the engaging force. And indeed to attempt a discrimination founded on different degrees of exertion would be very difficult, if not wholly impossible. Bynkershoek therefore, and he alone is a great authority, lays down the rule that the parties shall in joint capture share in proportion to their respective strength.[2] And this I apprehend to be the rule adopted in the prize courts of England and France, and perhaps forms the basis of the distribution among the other maritime powers of Europe.

"In the manner of *estimating the relative strength*, a great diversity of regulation exists. Valin, in his treatise of prize,[3] states that in France the mode varies in three classes of cases of joint capture. (1) Between a public ship and a privateer the distribution is in proportion to the number of cannon. (2) Between privateers, in proportion to the force and equipments, the number and calibre of the cannon of the respective ships; and the estimate in this case, depending upon such heterogeneous and complex combinations, is reduced to an unity of denomination by an arbitrary valuation of the component parts. (3) Between public ships in proportion to the number and calibre of their respective batteries of cannon.

"In England, as between public ships, cases of joint capture do not present any difficulty in the distribution. By the King's proclamation the whole property is shared by all the officers and crews of the capturing ships according to certain fixed proportions, in which all the officers of equal rank obtain an equal share. . . . As to privateers, no statute regulation exists, and therefore their claims are settled by the general law of relative strength. This relative strength is to be measured as has been settled by solemn adjudications at the 'Cockpit' and in the King's Bench, by the number of men on board each ship.[4] This rule has the advantage of great practical simplicity and general equity. It seems bottomed on the soundest sense, and places the relative force in the power and activity of animated beings, in which it must always ultimately reside, rather than in the mere instruments which without such power and activity would be useless and unavailing."

The learned judge accordingly followed the English rule laid down by Lord Mansfield in Roberts *v.* Hartley.

Statutory regulations.—Where joint captors are public ships the proportion in which they share is generally settled by statute or by statute enlarged by Proclamation, Ordinance, Decree, or Order in Council.

[1] 2 Gall., 1 (1813).
[2] Q.P. Jur. c. XVIII.
[3] "Des Prises," ch. XIX.
[4] Roberts *v.* Hartley, *supra.*

Great Britain.—By section 42 of the Naval Prize Act, 1864—[1]

"If in relation to any war, Her Majesty is pleased to declare, by Proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies, shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement."

By section 43—

"The number of the persons so on board the enemy's ship shall be proved in a Prize Court, either by the examinations on oath of the survivors of them or of any three or more survivors, or if there is no survivor, by the papers of the enemy's ship or by the examinations on oath of three or more of the officers and crew of Her Majesty's ship, or by such other evidence as may seem to the Court sufficient in the circumstances."

The distribution of all prize money is now regulated by the Royal Proclamation of 3 August, 1886.[2]

United States.—By section 4630 of the Revised Statutes—

"The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions to such vessels."[3]

The question of the relative superiority or equality of the prize to the capturing vessel or vessels was considered in the iron-clad "Atlanta."[4] This vessel was considered by the Confederates to be superior to two United States monitors lying in Wassau Sound. On the morning of 17 June, 1863, the "Atlanta" was sighted by the monitors "Weehawken" and "Nahant." The former was the first to engage the "Atlanta," and with her first shot, when within four hundred yards, struck the "Atlanta" upon the side of her casement, doing enormous damage, and with her second shot, when within two hundred yards, destroyed her pilot-house. Before the "Nahant" could come up and fire a shot the "Atlanta" surrendered. The Court below decided that the prize was of an inferior force, and accordingly awarded only one-half of the proceeds to the captors.

[1] 27 & 28 Vict. c. 25.
[2] State Papers, Vol. LXXVII, 1189.
[3] Title LIV, p. 908.
[4] 3 Wall., 425 (1865).

Upon appeal to the Supreme Court, this decision was upheld.

"The mere fact," said Field, J., "that the only shot fired and the only damage done was by the 'Weehawken' is not decisive. Other circumstances must be taken into account, such as the force, position, and intention of the 'Nahant.' The two vessels were known to be under the same command and of nearly equal force. The 'Atlanta' descended the Sound to attack both, and governed herself with reference to their combined action. It is not reasonable to suppose that her course would have been the one pursued, had she had only the 'Weehawken' to encounter. Besides, the fire of the 'Atlanta' was directed entirely to the 'Nahant,' and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the 'Weehawken.' This diversion must be considered in every sense of the term as giving aid to her. . . . It cannot be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did if the 'Nahant' had not been present in the action."

It was held by the Supreme Court (affirming the decision of the Court below), in Dewey *v.* United States,[1] that in determining whether the Spanish vessels sunk or destroyed by Admiral Dewey at Manila were of inferior or superior force to the American vessels engaged in that battle, the land batteries, mines and torpedoes *not controlled* by those in charge of the Spanish vessels, but which *supported* those vessels, were to be excluded altogether from consideration.

In the "Mangrove" prize-money[2] case, since the "Mangrove" was found to be the sole captor, it remained to be considered whether she was of inferior or superior force to the "Panama."

"There is no denying," said Mr. Justice Holmes, "that the 'Panama' was of force superior to the 'Mangrove.' She was of 1432 tons register, with a crew of seventy-one. She had substantially what was required by her contract as a mail steamship with the Spanish Government, viz. two Hontoria nine-centimetre guns with thirty rounds of shot for each, one Maxim gun on the bridge, two signal guns, twenty Remington rifles and ten Mauser rifles, all with ammunition, also bayonets and swords. The 'Mangrove' was a steel screw lighthouse tender, of not more than 800 tons, with a crew of thirty men, and with two six-pound guns and no small arms or cutlasses. The 'Panama' also was much the faster boat of the two. . . . If the master was a timid man, who would not have dared to fight under any circumstances, there would have been the same certainty of surrender to one who knew the whole situation, but the law would have looked only to the force and would not have gone into psychology. It would not matter that because of his timidity the breech blocks of the guns were left stowed below. If he had the materials for resistance and the chance to use them, that is as far as the law would inquire. So here. As was said by Judge Sprague, we must 'consider the means the vessels possessed, and not the use they made of them.'"[3]

[1] 178 U.S. Rep., 510 (1900).
[2] 188 U.S. Rep., 720 (1902).
[3] "Atlanta," 2 Sprague, 251.

In the case of the "Dos Hermanos,"[1] the capture was made by non-commissioned captors.

"Whatever," said Marshall, C.J., "might have been the ancient doctrine in England in respect to captures in war, it is now clearly established in that kingdom that all captures *jure belli* are made for the Government, and that no title of prize can be acquired but by the public acts of the Government conferring rights on the captors. If the original law of England authorized an individual to acquire to his own use the property of an individual, without any express authority from the public, that law was changed long before the settlement of this country. It never was the law of this country. Before the revolution, all captures from the enemy accrued to the Government to be distributed according to law; and the revolution could not strip the Government of this exclusive prerogative and vest it in individuals. It is then the settled law of the United States that all captures made by non-commissioned captors are made for the Government; and since the provisions of the Prize Acts as to the distribution of prize proceeds are confined to public and private armed vessels cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present must be in the nature of salvage for bringing in and preserving the property."

Salvage of one-half was awarded to the captors.

The exception in the section received judicial interpretation in the case of the "Sally,"[2] which was an American vessel captured when engaged in an illicit intercourse with the enemy. The Government claimed the prize as forfeited under the Act of Congress of 1 March, 1809.

"By the general law of prize," said Story, J., "property engaged in illegal intercourse with the enemy is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen; the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences of enemy ownership. In conformity with this rule, it has been solemnly adjudged, by the same course of decisions which has established the illegality of the intercourse, that the property engaged therein must be condemned as prize to the captors and not to the Crown. This principle has been fully recognized by Sir William Scott in the 'Nelly,'[3] and, indeed, seems never to have admitted a serious doubt. . . . The municipal forfeiture under the Non-intercourse Act was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the provision of mere municipal regulations, but is confiscable under the *jus gentium*.

"But even if the doctrine were otherwise, we are all satisfied that the Prize Act of June 26, 1812, c. 107, operates as a grant from the United States of all property rightfully captured by commissioned privateers as prize of war."

The principle here laid down that a statute creating a municipal forfeiture does not override or displace the law of prize was expressly followed in the "Hampton."[4]

[1] 10 Wheat., 306 (1825).
[2] 8 Cranch, 382 (1814).
[3] 1 Rob., 219.
[4] 5 Wall., 372 (1866).

The manner in which the prize-money is to be distributed amongst the captors is determined by section 4631 as follows :—

"First. To the commanding officer of a fleet or squadron, one-twentieth of all prize-money awarded to any vessel or vessels under immediate command.

"Second. To the commanding officer of a division of a fleet or squadron on duty under the orders of the commander-in-chief of such fleet or squadron a sum equal to one-fiftieth part of any prize-money awarded to a vessel of such division for a capture made while under his command, such fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors; but such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

"Third. To the fleet-captain, one-hundredth part of all prize-money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case when the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel.

"Fourth. To the commander of a single vessel, one-tenth part of all the prize-money awarded to the vessel under his command, if such vessel, at the time of the capture, was under the command of the commanding officer of a fleet, or squadron, or a division, and three-twentieths if his vessel was acting independently of such superior officer.

"Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board, including the fleet-captain, and borne on the books of the ship, in proportion to their respective rates of pay in the service."

The vessels which are entitled to share as joint captors in the proceeds of the prize are determined by section 4632 :—

"All vessels of the navy within signal distance of the vessel or vessels making the capture under such circumstances, and in such condition as to be able to render effective aid if required, shall share in the prize; and in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture; in which term shall be included vessels present at and rendering actual assistance in the capture."

What constitutes *signal distance* within the meaning of the Act, so as to entitle a ship to share in against capture, has been defined in the following cases :—

In the "Aries"[1] the actual captor was the "Stettin." Several vessels, which, with the "Stettin," formed a blockading squadron, claimed to be within signal distance. In disallowing the claim of the "Memphis," Sprague, J., found that this ship did not even hear a gun, but merely saw the glare of one gun and rocket as refracted

[1] 2 Sprague, 262 (1864).

through the fog. This did not, in his opinion, constitute such a system of signals by guns and rockets as to satisfy the statute.

The "St. John"[1] was also captured by the "Stettin," but in broad daylight. The nearest of the vessels claiming to participate was the "Flag," twelve to fourteen miles distant. Although the "Stettin" fired as many as eight guns, the largest on board, none were heard by the "Flag."

"Without," said Sprague, J., "undertaking to decide that a system of exchanging communication by guns cannot be established of such a character as to entitle all vessels within its reach to share in a prize with the actual captors, it is enough to repeat what I decided in the case of the 'Aries'—that the orders respecting guns and rockets in force in the squadron off Charleston do not amount to such a system; and to add that in this case the 'Flag' was not near enough to hear such guns as the 'Stettin' had in the then state of the wind and weather."

In the "Ella" and "Anna,"[2] Mr. Justice Sprague said:—

"The statute confers the right of sharing in the proceeds upon any vessel of the navy which 'shall be within signal distance of another making a prize'; that is, if she be within signal distance of *that* vessel at *that time*. If the state of the atmosphere from fog or haze, for example, is such as to prevent signals being seen, neither the language nor the reason of the statute is satisfied. Of what benefit would it be to a capturing vessel that another should, without her knowledge, be within a certain number of miles, but to which she could make no communication, and from which she could receive no encouragement by promise of assistance or otherwise?"

It may be observed that where armed vessels are equipped, as many now are, with the Marconi system of wireless telegraphy, "within signal distance" will require a new definition.

In the case of Stovel *v.* United States,[3] where a vessel which had been purchased by Commodore Dewey and registered as an American vessel, her armament consisting of two one-pounders and some small arms, and her crew not being enlisted to fight but shipped to perform manual labour, was during the battle at Manila within signal distance but not near enough to the enemy to render effective aid to the fleet, her crew were held not entitled to participate in the distribution of bounty.

In the "Mangrove" prize-money[4] case, vessels were held not to be *within* signal distance under the particular circumstances of this case. Here the "Mangrove" and the "Indiana" were between twelve and fifteen miles apart at the time of the capture of the "Panama."

"We need not consider," said Mr. Justice Holmes, "whether in order to bring a claimant within signal distance mutual communication must be

[1] 2 Sprague, 266.
[2] *Ibid.*, 267.
[3] 36 Ct. Cl., 392 (1901).
[4] 188 U.S. Rep., 720 (1902).

possible, or whether it is enough if signals from the vessel making the capture could be seen by the claimant. Taking it the latter way, still the words 'within signal distance' must be read in connexion with the further words 'under such circumstances and in such condition as to be able to render effective aid if required.' The whole sentence refers to the actual conditions of this particular case, not to an abstract objective criterion of ideal signal distance in general. ('Ella' and 'Anna.') The 'Mangrove' had no signal flags but boat flags, about three feet by four, the usual signal flags being about eight feet by eleven. Under such circumstances, we think it probably would be safe to assume five miles as an outside limit of signal distance in this instance, if the facts heretofore found by us rendered it necessary to be so nice. It is argued, to be sure, that gun signals would have been possible. As to this suggestion we deem it enough to say that we see no reason to believe that it was a practical working possibility under the circumstances, and therefore need not consider whether this statute would be satisfied by anything less than the possibility of reading the ordinary day signals in the case at bar."

The officers who are entitled to share in the proceeds of the prize are defined by section 4633 :—

"No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by the ships left on such station after he has gone out of the limits of his command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived in consequence of such absence of any prize-money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached until regularly discharged therefrom."

The provisions relating to the determination of the shares are to be found in section 4634 :—

"Whenever a decree of condemnation is rendered, the Court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors and what vessels are entitled to share, and such testimony may be sworn to before any judge or commissioner of the Courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the navy highest in rank, reasonably accessible to the deponent. The Court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize subject to the order of the Court, and the amount deducted therefrom for costs and

expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one-half to the captors and one-half to the United States."

The payment of bounty and its distribution are provided for by section 4635 :—

"A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize-money, and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy which they may be instructed to destroy or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture."

As it was decided in Dewey *v.* United States[1] that, excluding the land batteries, mines, and torpedoes, the American forces were superior to the Spanish, Admiral Dewey's claim was held to come within the clause allowing the sum of one hundred dollars for each person on board at the commencement of the engagement of the enemy's vessels sunk or destroyed.

The size and armaments of the vessels sunk or destroyed, together with the number of men upon them, were alone to be regarded in determining the amount of the bounty to be awarded.

The battle of Manila took place on 1 May, 1898, and by the Act of 3 March, 1899—

"All the provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels or any property hereafter captured, condemned as prize or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."[2]

It was held in the Manila Prize Cases[3] that the enemy's war vessels which were run ashore and sunk by their own commanders, though left in such a condition as not to be floated by any of the means ordinarily possessed by a naval force, could not be said to have been "sunk or otherwise destroyed" within the meaning of the section, when they were afterwards raised, reconstructed, and commissioned in the Navy. They were vessels captured and

[1] 178 U.S. Rep., 510 (1900).
[2] Revised Statutes Supplement, 1892–1901, p. 969; 30 Stat. L. 1004, c. 413, sec. 13.
[3] 188 U.S. Rep., 254 (1902).

appropriated to the use of the United States within the meaning of sections 4624 and 4625, and were therefore lawful prize for the benefit of the captors.

It was held in the "Infanta Maria Teresa"[1] that the words "ship or vessel of war belonging to the enemy" covered the entire equipment, including, said Fuller, C.J., "armament, outfit, and appurtenances, including provisions, money to pay the crew or for necessary expenditure, everything necessary to be used for the purposes of the vessel and as a vessel of war." The equipment, therefore, is not subject to condemnation as prize of war.

It was also held that the captors of the "Teresa" were only entitled to bounty and not to prize-money, since the vessel was ultimately lost.

In the engagement at Santiago the "Teresa" was so damaged that she could not be sent in for adjudication. There was no survey or sale, and she was not appropriated for the use of the United States under section 4625. Subsequently she was raised by a wrecking company under a contract with the Government and taken as far as Guantanamo, whence, after certain temporary repairs, she proceeded in tow and partly under her own steam to Norfolk, the nearest Government Navy-yard and the nearest point where permanent repairs could be made. On this voyage she was lost at Cat Island, and became a total wreck.

It was decided in the "Santo Domingo"[2] that where the captors of a vessel destroy it to prevent recapture, they are not entitled to prize-money, but to bounty under section 4635.

"When captors," said Judge Thomas, "take a lawful prize, they have alternative duties—to save it if practicable, to destroy it if it be impracticable to save it. The first duty insures prize-money and other elements of the right existing; the second duty involves the sacrifice of prize-money, and the pecuniary reward is in the form of bounty. But captors cannot scuttle the ship captured and have her in the form of prize-money. Their money reward is measured by what they deliver secure from the enemy. If persons be sent to capture a vessel and thereupon destroy her, the destruction precludes prize-money (Decatur *v.* United States);[3] and if the destruction *ex necessitate rei* must and does follow the capture, the captor's status is the same. Indeed, if it is impracticable to bring the property into port or to make some safe disposition of it, the captor's duty is to destroy, although it result in a renunciation of prize-money. The usual duty to save a capture from the enemy to earn prize-money stands as does the duty to sacrifice the prize and prize-money if occasion demands. The suggestion that a person bound to save against the peril of recapture, if he would have prize-money, may avoid the peril by destroying the subject of defence, and yet recover a compensation measured by

[1] 188 U.S. Rep., 283 (1903).
[2] 119 Fed. Rep., 386 (1903).
[3] Div. Ct. Cl., 201.

the value or proceeds of the thing destroyed as if it had been defended and saved, involves contradictions which forbid its adoption as a rule of war."

By section 4641, three distinct classes of vessels are mentioned as being entitled to participate in the proceeds of prize. There are (1) public armed ships; (2) privateers; and (3) vessels "not of the Navy, but controlled by either executive department."

"The net amount decreed for distribution to the United States or to vessels of the Navy shall be ordered by the Court to be paid into the Treasury of the United States, to be distributed according to the decree of the Court. The Treasury Department shall credit the Navy Department with each amount received to be distributed to vessels of the Navy; and the persons entitled to share therein shall be severally credited in their accounts with the Navy Department with the amounts to which they are respectively entitled. In the case of vessels not of the Navy and not controlled by any department of the Government, the distribution shall be made by the Court to the several parties entitled thereto, and the amounts decreed to them shall be divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement one-half to the owner and one-half to the ship's company according to their respective rates of pay on board; and the Court may appoint a commissioner to make such distribution, subject to the control of the Court, who shall make a due return of his doings with proof of actual payments by him, and who shall receive no other compensation, directly or indirectly, than such as shall be allowed him by the Court. In the case of vessels not of the Navy, but controlled by either Executive Department, the whole amount decreed to the captors shall be divided among the ship's company."

In the case of the "Rita,"[1] an unarmed merchant vessel, the status of the capturing vessel under this section was determined. The capture was made on 8 May, 1898, by the United States cruiser "Yale," which prior to 30 April, 1898, was known as the "City of Paris." She belonged to the International Navigation Company, and was of the class of steamships which under the provisions of the Act of 3 March, 1891, was subject to be taken by the United States as a cruiser or transport upon payment of her actual value. By a charter-party and supplementary agreement of 30 April, 1898, possession of the ship was transferred to the Government. She was then very heavily armed and converted into an auxiliary cruiser. The charter-party provided that the ship should be "manned, victualled, and supplied at the expense of the charterer," who was also to pay all other expenses whatever, and return the same in good repair less ordinary wear and tear. The supplementary agreement provided that the ship was "to be manned by her regular officers and crew, and in addition thereto was to take on board two naval officers, a marine

[1] 89 Fed. Rep., 763 (1898).

officer, and a guard of thirty marines," etc. During the continuation of the supplementary agreement the vessel was to be under the entire control of the senior naval officer.

At the time of the capture the "Yale's" company consisted of two naval officers and a marine guard of twenty-five men enlisted in the service of the United States, the remaining 269 officers and men doing duty on board and borne on the books of the ship not being commissioned by or enlisted in such service. The marine guard claimed to exclude the officers and men not so commissioned or enlisted from participation in the prize.

It was held that the "ship's company," within the meaning of the section, included not only the naval officers and the marines, but also the officers and men of the vessel "who were doing duty on board and borne on the books of the ship," and that they were entitled to share in proportion to their rate of pay from the owners of the vessel; that the words "in the service" were not limited to those in the regular service. "If they were not 'in the service' of the Government while performing this mission," said Judge Brawley, "they incurred the hazard of being considered as pirates."

It was further held that the crew were entitled by their shipping articles to 50 per cent additional wages from the owners for good behaviour at the end of the twelve months' service for which they were shipped, and that this fact did not affect their right to share in the prize-money, nor the fact that some were aliens, nor that they subsequently refused to enlist in the Navy.

By section 4642—

"All ransom-money, salvage, bounty, or proceeds of condemned property accruing or awarded to any vessel of the Navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize-money, under the direction of the Secretary of the Navy."

REGULATIONS ISSUED TO NAVAL COMMANDERS

Spain.—The following instructions were issued by the Minister of Marine on 23 April, 1898, for the information and use of naval officers:—

"10. In consequence of the visit the vessel is captured in the following cases:

"(1) If the nationality of the vessel proves to be that of the enemy, unless covered by the immunities established by the Geneva Convention, by which Spain is bound.

"(2) If active resistance is offered to the visit—that is, if force is employed to escape it.

"(3) If a legal document to prove the nationality cannot be produced.

"(4) If bound for the enemy's ports the vessel cannot produce a document proving the nature of the cargo.

"(5) If the cargo is composed in whole or more than two-thirds of contraband of war.

"In the case of the illicit part of the cargo being less than two-thirds only, the articles which are contraband of war will be confiscated, and to unload them the ship will be conducted to the nearest and most convenient Spanish port.

"It must be understood that goods directly and immediately affecting the war are contraband only when destined for the enemy's ports, for when they are consigned to a neutral port these goods are munitions of war, but not contraband.

"But if a vessel is despatched for a neutral port in proper form, but makes for a port of the enemy, then, if found near to one of those ports or sailing in quite a different direction than the proper one shown in her papers, she shall be captured if the captain cannot prove that *force majeure* drove him from his proper course.

"(6) If she carries on behalf of the enemy officers, troops, or seamen.

"(7) If she carries letters and communications of the enemy, unless she belong to a marine mail service, and these letters or communications are in bags, boxes, or parcels with the public correspondence, so that the captain may be ignorant of their contents.

"(8) If the vessel is employed in watching the operations of the war, either freighted by the other belligerent or paid to perform this service.

"(9) If the neutral vessel takes part in this employment or assists in any

"The vessel will also be captured when during the visit duplicate or way in such operations.

false papers are found, since such cases fall under the regulations contained in (3) or (4) or in both, since neither false nor duplicate papers can serve to justify the conditions referred to.

"Neither an attempt at flight to escape visit nor simple suspicion of fraud respecting the nationality of the vessel or the nature of its cargo authorize the capture of the vessel.

"The circumstances that the papers are written in a language unknown to the officer making the visit does not authorize the detention of the vessel.

"(11) Merchant vessels sailing under convoy, under charge of one or more ships of the navy of their nation, are absolutely exempt from the visit of the belligerents, being protected by the immunity enjoyed by the warships.

"As the formation of a convoy is a measure emanating from the Government of the State to which belong the vessels protecting the convoy, as well as the vessels under convoy, it must be taken as certain that the Government in question not only will not allow fraud of any kind, but has employed the strictest measures to avoid fraud being committed by any of the vessels under the convoy. It is therefore useless for the belligerent to inquire of the chief officer of the convoy whether he guarantees the neutrality of ships sailing under his charge or of the cargo they carry.

"(12) On the visit taking place, it is not permissible to give orders to open the hatchways in order to examine the cargo, nor to open any article

of furniture to search for documents. The ship's papers presented by the captain to prove the legitimacy of the flag and the nature of the cargo, are the only proof which international law allows.

"(13) Although it very seldom occurs that the principal ship's papers, whether those referring to her nationality or to the nature of her cargo, are lost, mislaid, or left on shore by mistake, if such a case should occur, and by other papers or means the captain can convince the officer visiting the ship of the neutrality of the ship and her cargo, he may authorize the captain to continue her voyage; but if an explanation cannot be given, the ship will be detained and conducted to the nearest Spanish port until the necessary investigation concerning the point or points in question is made.

"(14) The commander of the vessel carrying out the visit and the officer commissioned to make the visit, the former in ordering and the latter in carrying it out, should act without prejudice to the good faith of the neutral being visited, and without losing sight of the consideration and respect that nations owe to one another."[1]

United States.—Regulations for the guidance of all persons in the naval service were issued by the Navy Department on 7 August, 1876.[2] These were based upon the Act of 30 June, 1864,[3] and Title LIV of the Revised Statutes of 1874,[4] which was practically a reproduction of the Act of 1864. The following instructions were issued for the information and guidance of the naval service by the Navy Department on 30 June, 1898:—[5]

SENDING IN OF PRIZES

"(20) Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

"(21) The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure, and to this end her papers should be sealed at the time of the seizure, and kept in the custody of the prize-master. Attention is called to Articles XVI and XVII for the government of the United States Navy (Exhibit A).

"(22) All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and if circumstances permit it is preferable that the officer making the search should act as prize-master.

"(23) As to the delivery of the prize to the judicial authority, consult sections 4615, 4616, and 4617, Revised Statutes of 1874 (Exhibit B). The papers, including the log-book of the prize, are delivered to the commissioners; the witnesses to the custody of the United States marshall; and the prize itself remains in the custody of the prize-master until the court issues process directing one of its own officers to take charge.

[1] U.S. Papers: Foreign Relations (1898), 777.
[2] Hallick, Vol. II, 385.
[3] Statutes at Large, U.S., Vol. XIII, 306.
[4] Revised Statutes, U.S. (1873–4), 904.
[5] Papers: Foreign Relations, U.S. (1898), 782.

"(24) The title to property seized as prize changes only by the decision rendered by a prize court. But if the vessel itself or its cargo is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

"(25) If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered.

EXHIBIT A

"Article XVI. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole without fraud, concealment, or embezzlement shall be brought in, in order that judgment may be passed thereon, and every person who offends against this Article shall be punished as a court-martial may direct.

"Article XVII. If any person in the Navy strips off the clothes of or pillages or in any manner maltreats any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge.

EXHIBIT B

Sec. 4615. The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log-book, with all other documents, letters, and other papers found on board, and make an inventory of the same and seal them up and send them with the inventory to the court in which proceedings are to be held, with a written statement that they are all the papers found and are in the condition in which they were found; or explaining the absence of any documents or papers or any change in their condition. He shall also send to such court as witnesses the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize with the documents, papers, and witnesses, under charge of a competent prize-master and prize-crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from any superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interests of probable claimants as well as of the captors. If the captured vessel or any part of the captured property is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their report shall be sent to the Court in which proceedings are to be held;

and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the Assistant-Treasurer of the United States most accessible to such Court and subject to its order in the cause. (See section 1624, article XV, whereby 'the commanding officer of every vessel in the Navy entitled to or claiming an award of prize-money shall, as soon as it may be practicable after the capture, transmit to the Navy Department a complete list of the officers and men of his vessel entitled to share, stating therein the quality of each person rating; and every commanding officer who offends against this article shall be punished as a court-martial may direct'[1]).

"Sec. 4616. If any vessel of the United States shall claim to share in a prize, either as having made the capture or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is founded, the principal facts tending to show what vessels made the capture and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen or answered; and such statement of claim shall be signed by him, and sent to the Court in which proceedings shall be held and shall be filed in the cause.

"Sec. 4617. The prize-master shall make his way diligently to the selected port, and there immediately deliver to a prize-commissioner the documents and papers and the inventory thereof, and make affidavit that they are the same and are in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshall and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court. (See section 5441, whereby 'every person who wilfully does any act or aids or advises in the doing of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any captor or claimant of such property shall be punished by a fine of not more than ten thousand dollars or by imprisonment not more than five years or both.')"[2]

Great Britain.—The following instructions drawn up by the late Mr. Godfrey Lushington, and amended by Professor Holland, although not now issued to the public, are believed to be still substantially binding upon naval officers:—

DETENTION

"231. If upon visit and search of the vessel the commander has reason to entertain any suspicion, he should give the master an opportunity of

[1] Revised Statutes, United States, 1873-4. Title XV., chap. X., 279.
[2] *Ibid.* Title LXX., chap. V., 1060.

explanation,[1] and if after such opportunity given he is satisfied that there is proper evidence against her amounting to probable cause for her detention, he should detain her."

WHAT IS PROPER EVIDENCE AMOUNTING TO PROBABLE CAUSE

"232. Proper evidence is such evidence as will be admissible before the prize court, viz.:—

"(1) Facts appearing by inspection, as the character of the vessel, her equipment, cargo, and crew;

"(2) The papers on board;

"(3) The testimony of her master and crew.

"The commander should remember that no evidence by any of the captors in their own behalf will, at all events in the first instance, be admitted before the prize court.[2]

"233. Evidence against the vessel amounts to probable cause for her detention when the circumstances connected with the vessel and cargo are such as to afford reasonable ground for belief that the vessel or cargo, or both or part of the cargo, might prove upon further inquiry to be lawful prize; and it is immaterial whether these circumstances arise from the misconduct of the master or are beyond his control.[3]

"234. The commander should bear in mind that if the Court should find that the vessel has been detained without probable cause,[4] then, although there has been nothing intentionally vexatious in his conduct,[5] he will be condemned in costs and damages, even to the extent of making good any losses that have been the result of inevitable accident to the vessel and cargo while in his hands.

"235. On the other hand, if the Court comes to the conclusion that there was probable cause for the detention, then, although the vessel may be ordered to be restored, the commander will be held to have been in lawful possession of her, and therefore not answerable for casualties."[6]

DETENTION UPON SECOND SEIZURE

"236. Sometimes it happens that the vessel has been previously seized by another of His Majesty's cruisers and allowed to proceed as not being lawful prize; in such case the commander should use special precaution, but if he is nevertheless satisfied that there is probable cause for the detention of the vessel, he should detain her.[7]

DETENTION ACT OF COMMANDER ALONE

"237. The commander of the cruiser is alone responsible for the detention of a vessel, unless the commander of the squadron is actually present

[1] "Anna," 5 Rob., 385.

[2] "Henrick and Maria," 4 Rob., 57; "Haabet," 6 Rob., 54; "Glierktigheit," 6 Rob., 58; "Fortuna," 1 Dods., 81; "Aline and Fanny," 10 Moore, P.C., 491.

[3] "Ostsee," Spinks, 175.

[4] "Nemesis," Edw., 50; "Hoppet," Edw., 369; "Elizabeth," 1 Act., 10; "Otsu," Spinks, 174.

[5] "Ostsee," Spinks, 174; "Leucade," Spinks, 217.

[6] "John," 2 Dods., 336.

[7] "Mercurius," 1 Rob., 80; "Odessa," Spinks, 208.

and co-operating, or himself expressly orders the detention. The authority, therefore, for the formal detention of a vessel should in all cases proceed from the commander. But any officer of inferior rank who, whilst at a distance from his commander, falls in with a vessel, and after visit and search has reason to believe that she is liable to detention, should hold possession of her till he has communicated with his commander.

DETENTION: HOW TO BE EXERCISED

"238. As soon as the commander has come to the determination to detain the vessel, he should give notice to the master, and may state to him the ground on which the detention is made.[1] The commander should then without delay secure possession of the vessel by sending on board one of his officers and some of his own crew. If by reason of rough weather or other circumstances this is impracticable, the commander should require the vessel to lower her flag and to steer according to his orders.[2]

PAPERS TO BE SECURED

"239. Upon obtaining possession of the vessel, the first duty of the commander is to secure all the papers belonging to the vessel, as well as those which are usually denominated 'ship's papers,' and which relate to the vessel and cargo, as all other papers, of whatever description, which may be either delivered up or found on board.

"240. The vessel's papers, as soon as secured, should be arranged and numbered in consecutive order, care being taken that the enclosures are not separated from their envelopes. The importance of securing all the vessel's papers is manifest, inasmuch as the evidence to acquit or condemn the prize herself must in the first instance come solely from the prize herself, namely, from the papers on board, and from the depositions on oath of the principal persons belonging to the prize.

PAPERS TO BE VERIFIED BY AFFIDAVIT

"241. As soon as the vessel's papers have been arranged and numbered, an affidavit should be prepared for their verification. The affidavit may, in default of directions from the Admiralty, be in Form No. 4 and should always, if possible, be made by the person who found the papers, or to whom they were delivered up at the time of the capture. The affidavit should then be fair copied on foolscap paper, a broad margin being left at the side, and the whole of the vessel's papers numbered as aforesaid, should then be annexed thereto.

FORM NO. 4

"The , master.

"I, the undersigned, A. B. , holding the rank of in His Britannic Majesty's Navy, and belonging to His Majesty's ship , make oath as follows:—

"(1) I was present at the capture of the above-named vessel, the

[1] "Juffrow Maria Schroeder," 3 Rob., 147.
[2] "Edward and Mary," 3 Rob., 305; "Hercules," 2 Dod., 353.

, whereof was master, by His Majesty's said ship, the , on the day of , 19 .

"(2) The papers hereunto annexed and marked No. 1 to No. inclusive, are all the papers which were on board at the time of the capture of the said vessel, and were delivered up.

"(3) The said papers are now in the very same plight, save the numbering thereof, as when the same were delivered up.

"A. B.

"Sworn by the said A. B. at ,
"on the day of 19 .

"Before me, C. D., of .

"242. If any papers have been destroyed or thrown overboard, a further separate affidavit of the fact must be prepared. The affidavit may in default of directions from the Admiralty be in Form No. 5, and it should, if possible, be made by one of the persons who saw the papers destroyed or thrown overboard, or who succeeded in saving any of them after they had been thrown overboard. All papers so saved must be arranged and numbered before the affidavit is made, and after it has been made must be annexed thereto.

FORM NO. 5

"The , master.

"I, the undersigned, A. B. , holding the rank of in His Britannic Majesty's Navy, and belonging to His Majesty's ship , make oath as follows:—

"(1) I was present at the capture of the above-named vessel, the , whereof was master, by His Majesty's ship, the , on the day of , 19 .

"(2) A few minutes before the capture aforesaid, I saw two packets of papers thrown from one of the port-holes of the said vessel; the cutter was immediately lowered; one of such packets sank and was lost, but the cutter's crew succeeded in saving the other packet.

"(3) The papers hereunto annexed and marked No. 1 to No. inclusive are all the papers so saved, and are now in the very same plight, save the numbering thereof, as when they were saved.

"A. B.

"Sworn, etc.

"243. Again, should any papers be found concealed in any part of the vessel, a further separate affidavit of the fact must be prepared. The affidavit may, in default of directions from the Admiralty, be in Form No. 6, and it should, if possible, be made by the person who discovered the papers. All papers so found should be arranged and numbered before the affidavit is made, and after it has been made must be annexed thereto.

FORM NO. 6

(Same as No. 5)

"(2) In searching the vessel on the occasion of the said capture I found stowed away and concealed in a packet of papers.

"(3) The papers hereunto annexed and marked No. 1 to No. inclusive are all the papers so found and are now in the very same plight, save the numbering thereof, as when they were so found.

A. B.

"Sworn, etc.

"244. The affidavits should, on the first convenient opportunity, be sworn before one of His Majesty's Consuls or Vice-Consuls abroad, or before some other person duly commissioned to administer oaths in prize-matters; but no naval officer, although so commissioned, may act as commissioner or administer oaths in any case in which he himself is personally interested.

ACCOUNT TO BE TAKEN OF VALUABLES

"245. The commander should cause an account to be taken in writing of all money and valuables found on board the vessel. It will be convenient that this account should be taken in duplicate and duly certified, and one copy given to the master. In default of directions from the Admiralty the certificate may be in Form 7.

FORM NO. 7

"The , master.

"I, the undersigned, , holding the rank of in His Britannic Majesty's Navy, and commanding His Majesty's ship , do hereby certify that the following is a correct account of all moneys and valuables found on board the above-named vessel detained by me as lawful prize of war on the day of 19 ."

_____

_____

_____

_____

_____

_____

_____

Here state the several articles, distinguishing whether they were voluntarily given up or were found concealed, and where.

Signed this day of 19

_____

_____

Commanding His Majesty's Ship_____

NOTE.—I do hereby declare that on the day of 19 , I delivered a copy, signed by me, of the above certificate to the master of the ,

and that_____

Here state whether or not the master made any and what objection.

Signed this day of 19

_____

Commanding His Majesty's Ship_____

IF NECESSARY THE VESSEL AFTERWARDS TO BE RELEASED

"246. If, after the detention of the vessel, there should come to the knowledge of the commander any further facts tending to show that the vessel has been improperly detained, he should immediately release her, taking care to replace, as far as possible, everything in its original position.

"The following five clauses are substantially the regulations first printed in 1731, and approved by His Majesty in Council.

GENERAL DUTIES ON MAKING A CAPTURE

"247. When any ship or vessel shall be captured or detained her hatches are to be securely fastened and sealed and her lading and furniture and in general everything on board are to be carefully secured from embezzlement; the officer placed in charge of her shall prevent anything from being taken out of her until she has been tried and sentence shall have been passed on her in a court of prize.

EVIDENCE AND DOCUMENTS

"248. The captain of the capturing or detaining ship shall cause the principal officers of the vessel detained, and such other persons of the crew as he shall think fit to be examined as witnesses in the prize court, to prove to whom the vessel and cargo belong; and he shall send to the Court all passports, custom-house clearances, log-books, and all other ship's papers which shall be found on board, without suffering any of them to be on any pretence secreted or withheld.

TREATMENT OF PRISONERS

"249. The captain and the prize-master are to take particular care that all prisoners of war are treated with humanity; that their personal property is carefully protected; that they have their proper allowance of provisions, viz. two-thirds of all species except spirit, wine, or beer, of

which none shall ever be issued to them; and that every comfort of air and exercise, which circumstances admit of, be allowed them; but to prevent any hostile attempts on their part, they are to be always attentively watched and guarded, especially when many of the ship's company may happen to be employed aloft."

ACTING AS A SHIP OF WAR WITHOUT A COMMISSION

"250. If any ship or vessel shall be taken acting as a ship of war or privateer, without having a commission duly authorizing her to do so, a full report of all the particulars is at once to be made to the Admiralty.

BRITISH SUBJECTS SERVING IN AN ENEMY'S SHIP

"251. If any person found serving on board an enemy's ship of war or privateer shall be suspected to be one of His Majesty's subjects, not having lawfully renounced his allegiance, he shall be kept prisoner until directions are received as to the mode in which he shall be dealt with. The captain shall, by the first opportunity, send to the Admiralty an account of such suspected person and of his place of birth if known, and also any statements he may voluntarily make; and shall likewise direct some of the officers and men of the ship to notice very particularly every circumstance of the case, that they may be able to give evidence.

JOINT CAPTURE

"252. The ship to which a prize strikes her flag is the actual captor. Other ships may be held by the prize court to share as joint captors on the ground either of association or co-operation with the actual captor.

"253. If ships are associated or co-operating together, a capture made by one enures to the benefit of all.

ASSOCIATION

"254. The bond of association exists—

"(1) Between ships composing a blockading or cruising squadron; with the exception of those absent at the time of the capture, by reason of having been detached upon a separate service.

"(2) Between ships chasing together provided that the senior of the commanders of the several ships has assumed the command over all.

CO-OPERATION

"255. Ships being in sight of the prize as also of the captor, under circumstances to cause intimidation to the prize and encouragement to the captor, are held to be co-operating with the actual captor.

"256. In all cases of alleged joint capture, the commander, whether he is the actual captor or claims to be joint captor, should, as soon as possible after the capture, draw up a list of all the officers, seamen, marines, soldiers, and others who were actually on board his ship on the occasion of the capture; and also a list of the names of those belonging to the crew

who were absent on duty or otherwise at the time; and the cause of such absence should be specified. Each list should contain the quality of the service of each person and their several ratings, and must be subscribed by the commander and three or more of the chief officers on board.

"257. The commander should then send these lists, together with the particulars specified in section 195, and his report of the whole proceeding to the Secretary of the Admiralty.

"258. The distribution of all prize-money is regulated by the Royal Proclamation of the 3rd August, 1886.

JOINT CAPTURE BY BRITISH AND ALLIED SHIPS OF WAR

"259. In the case of captures made jointly by British and allied ships of war the duties of the respective commanders are usually regulated by treaty."

Thus a convention was made between Great Britain and France during the Crimean War, on 10 May, 1854,[1] and a similar convention between the same Powers on 22 February, 1860,[2] preparatory to the war with China.

The following are the terms of the two treaties relating to joint capture, which are identical:—

"Art. I. When a joint capture shall be made by the naval forces of the two countries, the adjudication thereof shall belong to the jurisdiction of the country whose flag shall have been borne by the officer having the superior command in the action.

"Art. II. When a capture shall be made by a cruiser of either of the two allied nations in the presence of and in the sight of a cruiser of the other, such cruiser having thus contributed to the intimidation of the enemy and encouragement of the captor, the adjudication shall belong to the jurisdiction of the actual captor.

"Art. III. In case of the capture of a merchant vessel of one of the two countries, the adjudication of such capture shall always belong to the jurisdiction of the country of the captured vessel. The cargo shall be dealt with, as to the jurisdiction, in the same manner as the vessel.

"Art. IV. In case of condemnation under the circumstances described in the preceding articles:

"(1) If the capture shall have been made by vessels of the two nations whilst acting in conjunction, the net proceeds of the prize, after deducting the necessary expenses, shall be divided into as many shares as there were men on board the capturing vessels, without reference to rank, and the shares belonging to the men on board the vessels of the ally shall be paid and delivered to such person as may be duly authorized on behalf of the allied Government to receive the same; and the distribution of the amount belonging to each vessel shall be made by each Government according to the laws and regulations of the country.

"(2) If the capture shall have been made by cruisers of either of the two allied nations in the presence and in the sight of a cruiser of the other, the division, the payment, and the distribution of the net proceeds of the prize, after deducting the necessary expenses, shall likewise be made in the manner above mentioned.

[1] State Papers, Vol. XLIV, 11. [2] Hertslet's "Treaties," Vol. II, 172.

"(3) If a capture made by a cruiser of one of the two countries shall have been adjudicated by the Courts of the other, the net proceeds of the prize, after deducting the necessary expenses, shall be made over in the same manner to the Government of the captor, to be distributed according to its laws and regulations.

"Art. V. The commanders of the vessels of war of their Majesties shall, with regard to the sending in and delivering up of prizes, conform to the instructions annexed to the present convention, and which the two Governments reserve to themselves to modify by common consent if it should become necessary.

"Art. VI. When in the execution of the present convention the valuation of a captured vessel of war shall be in question, the calculation shall be according to the real value of the same; and the allied Government shall be entitled to delegate one or more competent officers to concur in the valuation. In the case of disagreement, it shall be decided by lot which officer shall have the casting vote.

"Art. VII. The crews of the captured vessels shall be dealt with according to the laws and regulations of the country to which the present convention attributes the adjudication of the prizes.

INSTRUCTIONS REFERRED TO IN ARTICLE V TO THE COMMANDERS OF FRENCH AND ENGLISH SHIPS OF WAR

"Article I. Whenever in consequence of a joint action you are required to draw up the report or *procès-verbal* of a capture, you will take care to specify with exactness the names of the ships of war present during the action, as well as the names of their commanding officers, and as far as possible the number of men embarked on board these ships at the commencement of the action without distinction of rank.

"You will deliver a copy of that report or *procès-verbal* to the officer of the allied Power who shall have had the superior command during the action, and you will conform yourself to the instructions of that officer, as far as relates to the measures to be taken for the conduct and the adjudication of the joint captures so made under his command.

"If the action has been commanded by an officer of your nation, you will conform yourself to the regulations of your own country, and you will confine yourself to handing over to the highest officer in rank of the allied Power, who was present during the action, a certified copy of the report or of the *procès-verbal* which you shall have drawn up.

"Article II. When you shall have effected a capture in presence and in sight of an allied ship of war, you will mention exactly, in the report which you will draw up, when the capture is a ship of war, and in the report or *procès-verbal* of the capture when the prize is a merchant vessel, the number of men on board your ship at the commencement of the action without distinction of rank, as well as the name of the allied ship of war which was in sight, and, if possible, the number of men embarked on board that ship, likewise without distinction of rank. You will deliver a certified copy of your report or *procès-verbal* to the commander of that ship.

"Article III. Whenever in the case of a violation of a blockade of the transport of contraband articles of land or sea troops of the enemy, or of official despatches from or for the enemy, you find yourself under the

necessity of stopping or seizing a merchant vessel of the allied nation, you will take care—

"(1) To draw up a report or *procès-verbal* stating the place, the date, and the motive of the arrest; the name of the vessel, that of the captain, the number of the crew; and containing besides an exact description of the state of the vessel and of the cargo.

"(2) To collect and place in a sealed packet, after having made an inventory of them, all the ship's papers, such as registers, passports, charter-parties, bills of lading, invoices, and other documents calculated to prove the nature and the ownership of the vessel and of her cargo.

"(3) To place seals upon the hatches.

"(4) To place on board an officer with such number of men as you deem advisable to take charge of the vessel and to ensure its safe conduct.

"(5) To send the vessel to the nearest port belonging to the Power whose flag it carried.

"(6) To deliver up the vessel to the authorities of the port to which you shall have taken her, together with a duplicate of the report or *procès-verbal* and of the inventory above mentioned, and with the sealed packet containing the ship's papers.

"Article IV. The officer who conducts the captured vessel will procure a receipt proving his having delivered her up, as well as his having delivered the sealed packet and the duplicate of the report or *procès-verbal* and of the inventory above mentioned.

"Article V. In case of distress, if the captured vessel is not in a fit state to continue its voyage, or in case the distance should be too great, the officer charged to conduct to a port of the allied Power a prize made on the merchant service of that Power, may enter a port of his own country or a neutral port, and he will deliver his prize to the local authority if he enters a port of his own country, and to the Consul of the allied nation if he enters a neutral port, without prejudice of the ulterior measures to be taken for the adjudication of the prize. He will take care in that case that the report or *procès-verbal* and the inventory which he shall have drawn up, as well as the sealed packet containing the ship's papers, be sent exactly to the proper Court of Adjudication.

"Article VI. You are not to consider as prisoners of war, and you will allow freely to land all women, children, and persons not belonging to the military or maritime profession who shall be found on board the captured vessels.

"With this exception, and those which may be suggested by the consideration of your own security, you will not permit any person to be removed from on board the vessel, and in all cases you will retain the master, supercargo, and others whose evidence may be essential to the adjudication of the prize.

"You will treat as prisoners of war, with the exceptions above mentioned, all persons whatever who may be found on board the enemy's vessels.

"You will place no other restriction on the liberty of allied or neutral subjects found on board allied or neutral vessels than such as may be necessary for the security of the vessel.

"With respect to your own countrymen, you will treat them according

to the general instructions with which you are furnished, and you will in no case deliver them up to a foreign jurisdiction.

"The persons who may have been exceptionally removed from the captured vessels shall afterwards be sent back to their own country if they belong to the allied nation; if they are neutrals or enemies, they shall be treated as if they had been found on board vessels captured by you separately."

In default, however, of conventional regulations—

"260 (*a*) If one ship is the actual captor and another the joint, the charge of the prize belongs to the commander of the ship which is the actual captor, whether he is the junior or senior; and he should send her into a port of his own country for adjudication.

"(*b*) If two ships are both actual captors, the charge of the prize belongs to the senior of the two commanders, and he should send her into a port of his own country for adjudication.

SENDING IN FOR ADJUDICATION

"272. The commander should as soon as possible after capture send the vessel and cargo in for adjudication.

RANSOM ONLY IN CERTAIN CASES

"273. The commander is not at liberty, in lieu of sending in for adjudication, to take either ransom or bail for the ship or cargo, except in such cases as may be provided for by any Order in Council. If he enter into any contract or agreement for a ransom in contravention of such Order in Council, he is liable for every such offence to be proceeded against in the High Court of Justice at the suit of His Majesty in his Office of Admiralty, and on conviction to be fined at the discretion of the Court any sum not exceeding £500.

PENALTY FOR DELAY

"274. If the commander is guilty of unnecessary delay in sending in for adjudication, he will, in the event of restitution being decreed, be liable for damages.[1]

WHAT ARE PROPER PORTS OF ADJUDICATION

"275. A port of adjudication is a port to which the vessel and cargo are sent in order that they may lie there in safety pending proceedings for adjudication.

"276. The port of adjudication should, if possible, be a British port, either in the United Kingdom or elsewhere in the British Dominions; if not, an allied port;[2] but in the latter case it will be necessary, in order that proceedings for adjudication may be duly instituted, for the commander to forward the witnesses, together with the vessel's papers and

[1] "Peacock," 4 Rob., 185; "Susanna," 6 Rob., 48; "Gerasimo," 11 Moore, P.C., 88

[2] "Christopher," 2 Rob., 209; "Betsy," *ibid.*, 210 n.

necessary affidavits, in charge of one of the officers of his ship, to the nearest British prize court.

"277. None but a British or an allied port can be a proper port of adjudication; although in cases of necessity hereafter considered, resort may be had to a neutral port.[1]

CHOICE OF PORT

"278. From the ports which are proper ports the commander should select the one which under all the circumstances shall appear most convenient. He should have regard, in the first place, to the exigencies of the public service, and in the second, the interests of all parties concerned,[2] viz., the owners of the vessel and of the cargo and the captors. These interests (*inter alia*) require—

"(1) That the port should be capable of giving security to the vessel.[3]

"(2) That it should not necessitate unlivery of the cargo.[3]

"(3) That it should be easily accessible to the prize court.[3]

"(4) That it should be as near as possible to the place of capture.[4]

"279. If the commander in the selection unreasonably disregard the interests of the owners of the vessel and cargo, he will be liable in damages.

NAVIGATION OF THE PRIZE

"280. Having selected the port, the commander should appoint a prize officer to take charge.

"281. The commander may invite the master and crew of the prize to assist in navigating her to the port under the order of the prize officer,[5] but if they refuse he will not be justified in coercing them.[6]

"282. He should place under the command of the prize officer a prize crew sufficient for the safe conduct of the prize, having regard to her size, character, and condition, the length and nature of the voyage, the number of her crew, their disposition to co-operate or resist, and all other circumstances of the case.

WHAT IS TO BE SENT IN WITH THE PRIZE

"283. If possible the prize should be sent in in the same condition as when she was taken, with her master, crew, and all her cargo on board. Sometimes, however, it is impracticable for the commander wholly to fulfil this requisition.[7]

"284. The affidavits and ship's papers must be forwarded in the prize to the port of adjudication. If the affidavits have not been sworn at the time when the prize was despatched, it will be necessary that some person

[1] "Henrick and Maria," 4 Rob., 43; "Comet," 5 Rob., 96; "Polka," Spinks, 57.
[2] "Anna," 5 Rob., 373; "Hunter," 1 Dod., 482.
[3] "Washington," 6 Rob., 275; "Principe," Edw. 70.
[4] "Peacock," 4 Rob., 185; "Wilhelmsburg," 5 Rob., 143; "Anna," 5 Rob., 373; "Catherina Elizabeth," 1 Acton 309; "Maryland," 1 Acton, 310; "Hunter," 1 Dod., 482.
[5] "Resolution," 6 Rob., 13. [6] "Pennsylvania," 1 Acton, 33.
[7] "Speculation," 2 Rob., 293; "Flying Fish," 2 Gall., 374.

should be sent with her, in whose charge the papers should be given, and who will be able upon the arrival of the prize to make the affidavits verifying the papers and to depose (if required) as to all the circumstances of the capture. If the affidavits have been duly sworn before the prize is sent in, they should, together with the ship's papers annexed thereto, be enclosed in an envelope securely sealed up and addressed to the Registrar of the Court before which the case is to be adjudicated, and should be given to the prize officer with directions to deliver the same unopened into the Registry.

INSURANCE OF PRIZE

"285. The risk attending the vessel and cargo until sold or released by order of a prize court falls upon the captors. Accordingly it lies with the commander to insure the prize and her cargo if he think any insurance advisable.[1]

DUTY OF CAPTOR IF UNABLE TO SEND IN THE WHOLE OF THE CREW

"286. If it is impracticable to send in the whole of the crew in the prize, the commander should at least send three or four of the principal persons to be witnesses, amongst whom should be two of the following officers, viz. the master, supercargo, mate or boatswain.

"287. The commander should at the same time draw up an affidavit to be made by the prize officer, stating what persons have been removed and what is the cause of their removal. In default of directions from the Admiralty the affidavit may be in Form 8.

FORM NO. 8

"The master.

"I, the undersigned, A.B. , holding the rank of in His Britannic Majesty's Navy, and belonging to His Majesty's ship , make oath as follows:—

"(1) On the day of 19 , Captain the Commander of the said ship captured the said vessel, the in latitude , and longitude , and detained her as lawful prize of war.

"(2) On the day of 19 , the said Captain previous to sending the prize in for adjudication removed from her .

"(3) The cause of the said removal was .

"A.B.

"Sworn, etc.

"288. All persons so removed should, as soon as possible, be forwarded to the port of adjudication; and in the meantime should be provided for either on board ship or on shore as may be found most convenient.

[1] "Catherine and Anna," 4 Rob., 39.

DUTY OF CAPTOR IF CARGO IS UNFIT TO BE SENT IN

"289. If the cargo appears to be not in a fit condition to be sent in, the commander should cause a survey thereof to be made by the officers of his ship the best qualified for the duty.

"290. The surveying officer should report to the commander in writing; and the report should be signed by them and entered on the ship's log.

"291. If the surveying officers report that the cargo is not in a condition to be sent in, the commander should cause it to be sold.

"292. The sale may be made either on the spot or in any neutral port where the local authorities may allow such sale; and for the purpose of selling the cargo at a neutral port the commander may either send the prize in the first instance to such port, or cause the cargo to be transhipped and so forwarded.

"293. Previous to the sale the cargo, or such part as is intended to be sold, should be appraised. The appraisers should be competent persons as far as possible, and should be sworn to be impartial. The appraisement should be in writing.

"294. The sale should be made by the authority and in presence of the prize officer, and if possible by public auction; and the proceeds of sale should be remitted without delay in pursuance of any regulations that may be made for this purpose by Order in Council, or in the absence of such regulation, into the Bank of England to the credit of His Majesty's Paymaster-General, or into the hands of some Government accountant; and the prize officer should draw up an affidavit of all the proceedings and annex thereto the report of the surveying officers, the appraisement, account sales and other documents, and take the same in the prize to the port of adjudication.

"295. In default of directions from the Admiralty, the affidavit may be in Form 9.

FORM NO. 9.

"The master.

"I, the undersigned, A.B. , holding the rank of in His Britannic Majesty's Navy, and belonging to His Majesty's ship , make oath as follows:—

"(1) On the day of 19 , I was appointed Prize Officer in charge of the said vessel, the , for the purpose of taking her to the port of for adjudication.

"(2) In the course of the said voyage, namely on the day of , I removed from the said vessel the following, namely

"(3) The cause of the said removal was .

"A.B.

"Sworn, etc.

DUTY OF CAPTOR IF PRIZE IS UNFIT TO BE SENT IN

"296. If the prize appears to be unfit to be sent in, the commander should cause a survey to be made thereof by the officers of his ship best qualified for the duty.

"297. The surveying officers should report to the commander in writing, and the report should be signed by them and entered on the ship's log.

"298. If the surveying officers report that the prize is not in a condition to be sent in, the commander should, if practicable, take her into the nearest neutral port that may be willing to admit her.

"299. The commander, however, must bear in mind that he cannot take the prize into a neutral port against the will of the local authorities, and that under no circumstances can proceedings for adjudication be instituted in a neutral country.[1]

"300. Both the cruiser and, if admitted, her prize are by the comity of nations exempt from the local jurisdiction.[2]

"301. If the prize is admitted into a neutral port, then in order that proceedings for adjudication may be duly instituted, the commander should forward the witnesses, together with the vessel's papers and necessary affidavits in charge of an officer of his ship, to the nearest British prize court.

"302. Amongst the affidavits must be one by the prize officer, stating the circumstances under which the prize was sent to a neutral port, and having the report of the surveying officers annexed thereto.

"303. In either of the following cases—

"(1) If the surveying officers report the vessel not to be in a condition to be sent in; or

"(2) If the commander is unable to spare a prize crew to navigate the prize,

the commander should release the prize and cargo without ransom, *unless there is clear proof that she belongs to the enemy.*[3]

"304. But if in either of these cases there is clear proof that the prize belongs to the enemy, the commander should remove her crew and papers, and if possible her cargo, and *then destroy the vessel.* The crew and cargo (if saved) should then be forwarded to a proper port of adjudication in charge of a prize officer, together with the vessel's papers and the necessary affidavits. An affidavit should be made by the prize officer exhibiting the evidence that the prize belonged to the enemy, and the facts which rendered it impracticable to send her in for adjudication."

CODES DES PRISES

Regulations relating to capture, and the formalities of capture, proposed by the Institut de Droit International :—[4]

[1] "Flad Oyen," 1 Rob., 135.
[2] Attorney General's Opinions (U.S.), Vol. VII, 123.
[3] "Actæon," 2 Dods., 48; "Felicity," 2 Dods., 381; "Leucade," Spinks, 238.
[4] "Revue de Droit Inter.," Vol. XIX, 149.

4. DE LA SAISIE[1]

"Sec. 23. La saisie d'un navire ou d'une cargaison, ennemi ou neutre, n'a lieu que dans les cas suivants.

"(1) Lorsqu'il résulte de la visite que les papiers de bord ne sont pas en ordre;

"(2) Dans tous les cas de soupçon mentionnés au sec. 20;

"(3) Lorsqu'il résulte de la visite, ou de la recherche, que le navire arrêté fait des transports pour le compte et à destination de l'ennemi;

"(4) Lorsque le navire a été pris en violation de blocus;

"(5) Lorsque le navire a pris part aux hostilités ou est destiné à y prendre part.

5. DE LA NATIONALITÉ DU NAVIRE, DE LA CARGAISON ET DE L'ÉQUIPAGE

"Sec. 24. La nationalité du navire, de sa cargaison, de son équipage doit être constatée par les papiers de bord trouvés sur le navire saisi, sans exclusion, toutefois, d'une production ultérieure devant les tribunaux de prise.

"Sec. 25. La question de savoir si les conditions de nationalité sont remplies est decidée selon la législation de l'Etat auquel le navire est ressortissant.

"Sec. 26. L'acte juridique constatant la vente d'un navire ennemi faite durant la guerre doit être parfait, et le navire doit être enregistré conformément à la législation du pays dont il acquiert la nationalité, avant qu'il quitte le port de sortie. La nouvelle nationalité ne peut être acquise au navire par une vente faite en cours de voyage.

"Sec. 27. Les papiers de bord requis en vertu du droit international sont les suivants:

"(1) Les documents relatifs à la propriété du navire;

"(2) Le connaissement;

"(3) Le role d'équipage, avec l'indication de la nationalité du patron et de l'équipage;

"(4) Le certificat de nationalité, si les documents mentionnés sous le chiffre 3 n'y suppléent;

"(5) Le journal de bord.

"Sec. 28. Les documents énoncés au précédent article doivent, pour avoir force probante, être rédigés clairment et sans equivoque.

"Sec. 29. Si dans la constatation d'une circonstance déterminante pour la saisie, il y a évidence quant à la nationalité ou la destination du navire, ou quant à la nature de la cargaison, ou quant à la nationalité du patron et de l'équipage, suivant le fait dont il s'agit—et qu'un papier de bord ordinairement relatif à l'une de ces questions manque—la seule absence de ce papier n'est pas un motif de saisie, pourvu toutefois que les autres papiers de bord soient parfaitment d'accord entre eux le point en question.

[1] "Revue de Droit Inter.," Vol. XIX, 149.

6. DES TRANSPORTS INTERDITS DURANT LA GUERRE

"Sec. 30. Sont sujets à saisie, durant la guerre, les objets susceptibles d'être employés à la guerre immédiatement, qui sont transportés par des navires de commerce nationaux, neutres ou ennemis, pour le compte ou à destination de l'ennemi (contrebande de guerre). Les gouvernements belligérants auront à déterminer d'avance, à l'occasion de chaque guerre, les objets qu'ils tiendront pour tels.

"Sec. 31. Les objets de contrebande de guerre doivent être réellment à bord au moment de la recherche.

"Sec. 32. Ne sont pas réputés contrebande de guerre les objets nécessaires à la défense de l'équipage et du navire, pourvu que le navire n'en ait pas fait usage pour résister à l'arrêt à la visite, à la recherche ou à la saisie.

"Sec. 33. Le navire arrêté pour cause de contrebande de guerre peut continuer sa route, si sa cargaison ne se composé pas exclusivement ou en majeure partie de contrebande de guerre, et que la patron pret à livrer celle-ci au navire des belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du commandant du croiseur.

"Sec. 34. Sont assimilés au transport interdit de contrebande de guerre (sec. 30), les transports de troupes pour opérations militaires, sur terre et sur mer, de l'ennemi, ainsi que les transports de la correspondance officielle de l'ennemi, par les navires de commerce nationaux, neutres ou ennemis.

7. DU BLOCUS

"Sec. 35. Le blocus déclaré et notifié est effectif lorsqu'il existe un danger imminent pour l'entrée ou la sortie du port bloqué, à cause d'un nombre suffisant de navires de guerre stationnés ou ne s'écartant que momentanément de leur station.

"Sec. 36. La declaration du blocus doit déterminer non seulement les limites du blocus par leurs latitude et longitude, et le moment précis où le blocus commencera, mais encore, eventuellement, le délai que peut être accordé aux navires de commerce pour décharger, recharger et sortir du port (sec. 7).

"Sec. 37. Le commandant du blocus doit en outre, notifier la déclaration du blocus aux autorités et aux consuls du lieu bloqué. Les mesmes formalités seront remplies lors du rétablissement d'un blocus qui a cessé d'être effectif, et lorsque le blocus sera étendu à des points nouveaux.

"Sec. 38. Si les navires bloquants s'éloignent de leur station pour un motif autre que le mauvais temps constaté, le blocus est considéré comme levé ; il doit alors être de nouveau déclaré et notifié.

"Sec. 39. Il est interdit aux navires de commerce d'entrer dans les places et ports qui se trouvent en état de blocus effectif et d'en sortir.

"Sec. 40. Cependant il est permis aux naivres de commerce d'entrer, pour cause de mauvais temps, dans le port bloqué, mais seulement apris constatation, par le commandant du blocus, de la persistance de la force majeuere.

"Sec. 41. S'il est évident qu'un navire de commerce approchant du port bloqué n'a pas en connaissance du blocus déclaré et effectif, le commandant du blocus l'en avertira, inscrira l'avertissement dans les papiers de bord du navire averti, tout au moins dans le certificat de nationalité et dans le journal de bord, en marquant la date de l'avertissement, et invitera le navire à s'eloigner du port bloqué, au l'autorisant à continuer son voyage vers un port non bloqué.

"Sec. 42. On admet l'ignorance du blocus lorsque le temps écoulé depuis la déclaration du blocus est trop pui considerable pour que le navire en cours de voyage qui atenté d'entrer dans le port bloqué, ait pu en être instruit.

"Sec. 43. Un navire de commerce sera saisi pour violation de blocus lorsqu'il aura essayé par force ou par ruse de pénétrer à travers la ligne de blocus; ou si, après avoir été renvoyé une première fois, il a essayé de nouveau de pénétrer dans le même port bloqué.

"Sec. 44. Ni le fait qu'un navire de commerce est dirigé sur un port bloqué, ni le simple affrètement, ni la seule destination du navire pour un tel port ne justifient la saisie pour violation de blocus. En aucun cas, la supposition d'un voyage continu ne peut justifier la condemnation pour violation de blocus.

8. DES FORMALITÉS QUI SUIVENT LA SAISIE

"Sec. 45. Après la saisie, le capteur fermera les écoutilles et la soute aux poudres du navire saisi, et y apposera les scellés. Il fera de même à l'égard de la cargaison, après que celle-ci aura été inventoriée.

"Sec. 46. Il ne sera rien vendu, ni déchargé ni derangé, ni en général distrait consommé ou détérioré de la cargaison.

"Si cependant la cargaison consiste en choses pouvant se gâter facilement ou si ces choses sont avariées, le capteur prendra les mesures les plus convenables pour la conservation de la cargaison, du consentement et en présence du patron, ainsi qu'en présence d'un consul de la nationalité du navire saisi, s'il s'en trouve un dans le voisinage du lieu de la capture. Le commandant du navire capteur procédera à cet effet à l'inspection de la cargaison.

"Sec. 47. Le capteur dressera l'inventaire du navire saisi et de la cargaison, ainsi que la liste des personnes trouvées à bord, et fera passer à bord du navire saisi un équipage suffisant pour s'assurer du navire et y maintenir l'ordre.

"Sec. 48. Le capteur saisira tous les papiers de bord, documents et lettres qui se trouvent sur le navire saisi. Ces papiers documents et lettres seront réunir dans un parquet revêtu du cachet du commandant du navire de guerre et de celui du patron du navire saisi; il sera dressé inventaire de ces papiers, documents et lettres, et le commandant du navire de guerre déclarera par écrit, dans le procès-verbal que ce sont là *tous* les papiers trouvés sur le navire; il y ajoutera une mention indiquant quels papiers manquaient au moment de la saisie et dans quel état se trouvaient les papiers saisis, notamment s'ils paraissent avoir été altérés.

"Sec. 49. Le capteur dressera procès-verbal de la saisie que de l'état du navire, et de la cargaison, en y mentionnant le jour et l'heure de la saisie; à quelle hauteur elle a eu lieu; la circonstance qui l'a motivée; le nom du navire et celui du patron; le nombre d'hommes composant l'équipage; sous quel pavillon naviguait le navire au moment de l'arrêt et s'il y a eu résistance de la part du navire, et dequelle nature a été la résistance. Seront joints au procès-verbal les inventaires du navire, de la cargaison et des papiers de bord, avec mention au procès-verbal que les inventaires ont été dressés. Copie du procès-verbal sera transmise à l'autorité militaire supérieure de laquelle relève le navire capturé.

"Sec. 50. Il sera permis au capteur de brûler ou de couler bas le navire ennemi[1] saisi, après avoir fait passer sur le navire de guerre les personnes qui se trouvaient à bord et déchargé autant que possible la cargaison, et après que le commandant du navire capteur aura à pris sa charge les papiers de bord et les objets importants pour l'enquête judiciaire et pour les réclamations des propriétaires de la cargaison en dommages et intérêts dans les cas suivants.

"(1) Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;

"(2) Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;

"(3) Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;

"(4) Lorsque le navire de guerre ne peut mettre sur le navire saisi un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;

"(5) Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.

"Sec. 51. Il sera dressé procès-verbal de la destruction du navire saisi et des motifs qui l'ont amenée; ce procès-verbal sera transmis à l'autorité supérieure militaire et au tribunal d'instruction le plus proche, lequel examinera et au besoin complétera les actes y relatifs et les transmettra au tribunal des prises.

"Sec. 52. Des personnes se trouvant à bord du navire saisi, les seules qui seront considérées comme prisonniers de guerre sont celles qui font partie de la force militaire de l'ennemi, et celles qui ont assisté l'ennemi ou sont soupçonnées de l'avoir assisté.

"Sec. 53. Le patron, le subrécargue, le pilote et les autres personnes qu'il pourra être nécessaire d'entendre pour la constatation des faits, seront retenus à bord provisoirement. Ces personnes ne seront autorisées à quitter le bord, après leur déposition, qu'un vertu d'une décision du tribunal instructeur.

"Sec. 54. Les personnes trouvées et retenues à bord seront nourries et au besoin vêtues et soignées par le gouvernement de l'Etat auquel appartient le navire capteur. Le patron fournira caution pour les frais qui en résulteront, lesquels pourront être remboursés en vertu du jugement.

[1] This word was introduced after much discussion at the Congress of Heidelberg, 1887.

"Sec. 55. On laissera aux hommes de l'equipage les effets servant à leur usage personnel.

"Sec. 56. Il n'est pas permis au capteur de débarquer les hommes de l'équipage qui ne sont pas nécessaires pour l'enquête et qu'il y a lieu de renvoyer immediatement, faute de place sur le navire capteur ou faute de vivres, sur des terres incultes et inhabitées. Mais il sera permis au capteur de faise passer les hommes à bord de navires neutres ou alliés qu'il pourra rencontrer, et de les débarquer sur des territoires cultivés et habités.

"Sec. 57. Le capitaine du navire capteur répond du bon traitement et du bon entretien des personnes trouvées à bord du navire saisi, par l'équipage du navire capteur et par celui qui conduit le navire saisi; il ne doit pas tolérer que celles même d'entre ces personnes qui sont prisonniers de guerre soient employées à des traveaux avilissants.

9. DU TRANSPORT DU NAVIRE SAISI EN UN PORT

"Sec. 58. Le navire saisi sera conduit dans le port le plus voisin de l'Etat capteur ou dans un port d'une puissance alliée où se trouvera un tribunal pour instruire à l'égard du navire saisi.

"Sec. 59. Le navire saisi ne pourra être conduit dans un port d'une puissance neutre que pour cause de péril de mer, ou lorsque le navire de guerre sera poursuivi par une force ennemie supérieure.

"Sec. 60. Lorsque, pour cause de péril de mer, le navire de guerre s'est réfugié avec le navire saisi dans un port neutre, ils devront quitter ce port aussitôt que possible, après que le tempête un cessé. L'Etat neutre a le droit et le devoir de surveiller le navire de guerre et le navire saisi durant leur séjour dans le port.

"Sec. 61. Lorsque le navire de guerre s'est réfugié avec le navire saisi dans un port neutre, parce qu'il était poursuivi par une force ennemie supérieure, la prise sera relâchée.

"Sec. 62. Le navire saisi et la cargaison seront, autant que possible, conservés intacts durant leur voyage au port; la cargaison sera close et scellée sauf dans le cas où la levée des scellés et l'ouverture de la cargaison seraient jugées necessaires dans l'intérêt de la conservation de celle-ci, avec le consentement du patron."

CHAPTER IX

RECAPTURE AND RESCUE

RECAPTURE or rescue may be made from (1) a pirate or (2) from a captor clothed with a lawful commission, or (3) from an enemy.

(1) **Recapture or rescue from a pirate.**—In the first case, since the owner is never divested of his ownership in the property, but only of his possession, he is entitled to restitution upon making some remuneration to the recaptor in the nature of salvage. This rests upon the principle derived from the civil law, that the capture by pirates does not, like the capture by enemies in open warfare, change the title or divest the original owner of his right to the property, and consequently does not require the application of the doctrine of postliminy to restore it.

It is a universal principle of the law of nations, says Brown, that the spoil never vests in piratical captors, and cannot be transferred to third persons, but must be restored to the original owners on salvage.[1]

Thus Grotius wrote:—

"Ea quae piratae aut latrones nobis eripuerant non opus habent post liminio ut Ulpianus et Javolinus responderunt; quia jus gentium illis non concessit ut jus domini mutare possint."[2]

But, as he observes, other rules may be established by municipal law, as, for instance, by the law of Spain, whereby the ships recaptured from pirates became the property of their captors[3] if the pirates had been in possession more than twenty-four hours. He also cites a case in which Nicolas Verdun, President of the High Court of Paris, decided that goods the property of French citizens taken by the Algerines, who were accustomed to prey upon all nations at sea, changed their ownership by the right of war, and consequently, when recaptured by others, became the property of the recaptors.[4]

[1] Civil and Adm. Law, Vol. II, 461.
[2] Lib. III, chap. IX, sec. 17. See Dig. De Capt. et Postlim., 49, 15, 19.
[3] See Ordinance of 1621, Art. X.
[4] Lib. III, chap. IX, sec. 19.

This practice was based upon the principle that private interests should yield to public utility, and that the greatest possible inducements should be held out to those who put down a public nuisance.

But by the Ordonnance de la Marine, 1681,[1] if any ship belonging to the King's allies or subjects is recaptured from a pirate, it shall be restored to the proprietors in consideration of one-third of the value of the ship and cargo as salvage, independently of the time during which it may have been in the pirate's possession, provided the claim is made within a year and a day after the report of the capture to the Admiralty.[2] In commenting upon this Ordinance, Valin considers that if the recaptor is a stranger he would be entitled to the whole of the property whether the prize had been in his possession twenty-four hours or not, provided the law of his country gave to the recaptors the whole of the property.[3] In support of this opinion he cites the Decree of the Parliament of Bordeaux of 8 March, 1635, confirming a sentence of the Admiral of Guienne in favour of a Dutch vessel which had recaptured from African pirates a Breton ship.

To this interpretation, says Wheaton, Pothier objected that the laws of Holland having no power over Frenchmen and their property within French territory, the French subject could not thereby be deprived of the property in his vessel, which had not been divested by the piratical capture according to the law of nations, and that, therefore, it ought to have been restored to him upon payment of salvage, as prescribed by the Ordonnance.[4]

(2) Recapture or rescue from a captor clothed with a lawful commission.—After the capture of a neutral vessel by a public ship lawfully commissioned of a belligerent, and whilst the former is still in the actual possession of the latter, a rescue by the crew of the neutral vessel is an act of resistance to the rights of the belligerent captor, and entails upon the neutral ship and cargo the penalty of condemnation, however innocent either may originally have been.

The principles and policy of the law as to the rescue of neutral vessels are clearly expressed by Sir William Scott in the "Dispatch."[5] This was a Danish vessel, captured by an English cruiser, and rescued out of the hands of the prize-master by the former master and crew left on board. After the rescue she was taken by a French privateer, from whom she was recaptured by the original captor and carried to St. Domingo.

[1] Title, "Des Prises," Art. X. [2] Valin, "Traité Des Prises," Vol. I, p. 9.
[3] *Ibid.*, p. 100. [4] Atlay's "Wheaton," p. 508; Pothier, "Traité de Propriété," No. 101.
[5] 3 Rob., 278 (1801).

"It is admitted," said Sir William, "that a rescue had taken place; but it is now represented to have been a mere *civil, peaceable* rescue, by which it is attempted to be distinguished from a *hostile* rescue. I should very much like to be informed how a rescue can be anything else than, as the term imports, a *delivery from force by force*. . . . Taking it to be, then, a case of forcible rescue of a neutral ship from the hands of a lawful cruiser, the law is clear, and the principle of it is founded on the soundest maxims of justice and humanity. If neutral crews may be allowed to resort to violence to withdraw themselves out of the possession taken by a lawful cruiser for the purpose of a legal inquiry, and may (as it has been termed) *hustle* them out of the command of the vessel, the whole business of the detention of neutral ships will become a scene of neutral hostility and contention; the crews of neutral ships must be guarded with all the severity and strictness practised upon actual prisoners of war, for the same measures of precaution and distrust will become equally necessary; the intercourse of nations, neutral and friendly towards each other, will be embittered by acts of hostility mutually committed by their subjects. At present, under the understanding of the law which now prevails, it is the duty of the cruiser to treat the crew of an apparently neutral ship, of which she takes possession for further inquiry into the real character of herself and her cargo, with all reasonable indulgence; and it is the duty of neutrals under that possession to take care that they do not put themselves in the condition of enemies, by resorting to such conduct as can be justified only by the character of enemies. It is the law and not the force of parties that must be looked to as the redresser of wrongs that may have been done by the one to the other. I have no hesitation in pronouncing this ship and cargo liable to condemnation, on the ground of the parties having declared themselves enemies by this act of hostile opposition to lawful inquiry."

Two years previously, in the case of the "Two Friends,"[1] Sir William Scott had drawn the same distinction.

"For although it is meritorious to rescue by force of arms from an enemy," he said, "it is quite the reverse to rescue from a neutral from whom the owner would have a right to claim costs and damages for an unjust seizure and detention. If instead of this a rescue by force is attempted and the party takes the law into his own hands, it becomes a breach of the law of nations, which would endanger the ship and cargo if that attempt should be disappointed."

The "Catherina Elizabeth"[2] was a French vessel under a French master, and the property claimed was American. The claim was resisted on the ground of a rescue by the master. But since England and France were then at war, the conduct of the master was that of an enemy and not of a neutral. As a prisoner of war, not under parole, he had a perfect right to emancipate himself by recapturing his own vessel.

"If," said Sir William Scott, "a *neutral* master attempts a rescue, he violates a duty, which is imposed upon him by the law of nations, to

[1] 1 Rob., 271 (1799). [2] 5 Rob., 232 (1804).

submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an *enemy* master the case is very different. No duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right to do so."[1]

There is, however, no duty on the part of a neutral Government to restore a private vessel of one of its citizens which has been rescued from a belligerent captor by her crew before condemnation and which has returned to her own country.

The "Emily St. Pierre"[2] was a British vessel which had been captured in the act of breaking the blockade of Charleston by the Federals, and had been ordered for adjudication to Philadelphia in charge of a prize crew. She was rescued by her crew, taken to Liverpool, and restored to her owners. Mr. Adams applied to Earl Russell for her restoration, on the ground that the rescue was a violation of the law of nations, which furnished a sufficient cause for condemnation, and a breach of the duty of a neutral, who is bound to submit to the adjudication of the prize court of the captor. He relied upon the cases of the "Dispatch" and the "Catherina Elizabeth."

Earl Russell refused the demand on two grounds—first, that as the rescue was not a violation of any municipal law of England, and as the vessel was not in the custody of the British Government, that Government had no legal right to take her out of the hands of her owners, or to prosecute or proceed against the vessel or the owners for any violation of law; secondly, that in addition to the technical objection, the offence was one solely against the laws of war made in the interests of belligerents, which they could assert and vindicate in their own tribunals. Admitting that rescue was a ground for condemnation, he contended that the decree could only be made by the belligerent prize court. No other court, either of the belligerent or of a neutral country, had jurisdiction to condemn or restore property taken in war. If the private neutral rescues his vessel by force, he takes all the risks of the captor's rights of force recognized by nations, but nothing more. The courts and Government of the neutral country cannot decide that the title to the vessel has passed to the captor before condemnation by the prize courts of the captor's country. All they do is to restore to the captor the temporary possessory right which he has between capture and condemnation. Such possessory

[1] See also Story's judgment in the "Nereide," 9 Cranch, p. 450; *supra*, p. 367.
[2] Snow's Cases, p. 655; Dana's Wheaton, 475, n. 183.

right he held to be one of force, which the captor's Government could guard and assert by condemnation or other penalty on the property, if in its possession, through its prize court; but even by the courts of the captor, the neutral rescuer could not be personally reached by criminal process. It was not incumbent on neutral Governments to make laws to enforce such belligerent possessory rights against their own citizens, any more than it is in the case of crimes committed by their citizens abroad, whom they do not even deliver up to the offended Government for trial, except by treaty stipulation; or in case of violations of the revenue or embargo laws of other countries, of which they never even indirectly take active cognizance, or in case of successful breach of blockade.

Upon the discovery that in 1800 Great Britain had made a similar claim against the United States, and had been met by the same answer, the claim was dropped.

In 1799 the "Experience," an American vessel captured by a British cruiser, was rescued by her crew and brought to Philadelphia. Upon the demand by Great Britain for her restitution, Mr. Pickering, Secretary of State, refused to interfere upon the same grounds as Earl Russell, viz. that it was an inchoate and belligerent right of captors which a neutral Government could not be expected to enforce against its own subjects.

In giving his opinion in the case of the "Lone,"[1] the American Attorney-General said that no instance was known to him in which the Government had been called upon to interpose and to restore to the captors property rescued from them by reason of a failure on their part to make the capture sure. In 1838, the "Lone" had entered the port of Matamoras, which was under blockade by a French squadron, and had sailed thence for New Orleans. On the homeward voyage she was captured by a French cruiser, rescued by her crew, and brought to New Orleans. A demand was thereupon made for her restitution by the President of the French Republic.

"If it were admitted," said Grundy, Attorney-General, "that there was such a violation of the blockade as to justify, according to the law of nations, the original capture, and if it is further admitted that the rescue of the vessel was, by the same law, an additional and lawful cause of condemnation, still it is a principle equally well established and recognized that the offence thus incurred never travels on with the vessel further than the end of the return voyage. If captured or recaptured in any part of that voyage, she is taken *in delicto*, and liable to be condemned; but if she terminates the entire voyage in safety, that liability has entirely ceased, nor can the captors demand her condemnation, much less her delivery to them.

[1] Attorney-General's Opinions, Vol. III, 377.

"It is a principle of international law equally well established, that the capture transfers no property in the vessel and cargo to the captors; but the title to it remains unchanged until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction. Upon this principle the captors in the present instance can claim no more property in the vessel and cargo than they could have done had there been no seizure. Their right of property, whatever it may be, does not vest until the vessel shall be legally condemned; and before that event they cannot ask the delivery of the property."

He also advised that the executive had no power to act before the legal rights had been determined by the judicial tribunal. There was no constitutional right vested in the President to deliver up the property of an American citizen before it had been condemned and legally adjudged to another. Moreover, if the captors had any legal title, and if there had been any inquiry, the institutions of the United States were open to them, and would afford that full satisfaction which it was the object of the French Government to obtain.

"The Admiralty Courts of the United States, whose judgments are based upon the established principles of international law, as recognized by all modern and civilized nations, are open to the captors and will administer justice commensurate with their rights."

This point may now be considered as settled, but whether the right can be vindicated by a possessory suit by the captors in the Admiralty Courts of the neutral has not been judicially decided; but, says Dr. Truman Snow, the course of the political departments of both Governments, and the reasoning on which they proceeded, seem to settle the judicial as well as the political question.

Salvage.—As a general rule, salvage will not be decreed for the rescue or recapture of a neutral vessel and cargo, since such a service confers no benefit, inasmuch as the original captor would be compelled by the tribunals of his own country to restore the property where it had been seized unjustly.

To this rule there is one important exception. Even in a civilized country, enjoying the comity of nations, a period may come when it throws aside its international obligations and no longer respects the rights of neutrals. This is what happened from the establishment of the French Republic in 1792. In the maritime war which followed, the French Prize Court jurisdiction was in a state of chaotic confusion. This jurisdiction was, for instance, on 14 February, 1793, handed over to the ordinary civil courts, and it was not until after many vicissitudes that a particular court or Conseil des Prises was established on 26 March, 1800.

The result of this state of affairs was a violent encroachment upon and complete disregard of the rights of neutrals, neutral property being condemned upon grounds both unjust and unknown to the international law. Accordingly, recapture of neutral property, which, if carried into French ports, would have become liable to condemnation under this incompetent and irregular jurisdiction, was regarded by the courts of Great Britain and the United States as a meritorious service, and was rewarded by the payment of salvage.

The leading case is the "War Onskan,"[1] a Swedish vessel taken by the French on a voyage to Oporto and retaken by a British cruiser on 26 October, 1799.

"It has certainly," said Sir William Scott, in awarding salvage to the captors, "been the practice of this Court lately to grant salvage on recapture of neutral property out of the hands of the French; and I see no reason to depart from it.

"I know perfectly well that it is not the modern practice of the law of nations to grant salvage on recapture of neutral vessels; and upon this plain principle that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral in to port, to release him with costs and damages for the injurious seizure and detention. This proceeds upon the supposition that those tribunals would duly respect the obligations of the law of nations—a presumption which, in the wars of civilized States, each belligerent is bound to entertain in their respective dealings with neutrals. But it being notorious to all Europe in the present war that there has been a constant struggle maintained between the governing powers in France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property—the one by its decrees, or the other by its decisions—the liberation of neutral property out of their possession has been deemed not only in the judgment of our Courts, but in that of neutrals themselves, a most substantial benefit conferred upon them in a delivery from danger, against which no clearness and innocence of conduct could afford any protection; and a salvage for such service has not only been decreed but thankfully paid, ever since these wild hostilities have been declared and practised by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise."

And this practice continued to be followed by the English Courts in spite of the Decree of 26 March, 1800.

The "Eleonora Catherina"[2] was a Russian vessel taken on a voyage from Archangel to London by a French privateer, and retaken by a British cruiser on 7 December, 1800. In awarding salvage, Sir William Scott observed:—

[1] 2 Rob., 299 (1799). [2] 4 Rob., 156 (1802).

"It is said that a great alteration has taken place in the French proceedings. . . . This Court is not informed in a satisfactory manner that any such beneficial change has taken place in the administration of Prize Law in the tribunals of France, and therefore it will continue to make the same decree, till the instructions from a superior court shall establish a different rule."

In the case of the "Carlotta,"[1] which was a Spanish vessel recaptured by a British cruiser from a French privateer, Sir William Scott refused to award salvage. Believing that the French Courts were being conducted with more regularity and with a disposition more inclined to return to the established principles of justice on which the prize system of ancient France, in common with that of other maritime countries of Europe, was built, there did not appear to him to be any ground for supposing that this property would have been condemned. At the same time the learned judge declared that if any edict could have been appealed to or any fact established by which it could have been shown that the property would have been exposed to condemnation in the French Courts, he would have held that a sufficient ground for awarding salvage in this particular case.

The full expenses of the recaptors were allowed.

Again, in the case of the "Huntress,"[2] Sir William Scott refused to award salvage. This was an American vessel laden with stores and provisions for the use of the American commodore on the Mediterranean station, with a contingent destination to Malta or Syracuse, when she was taken by a Spanish privateer and retaken by a British privateer.

"It is true," he said, "that during the last war the universal system of plunder and violence, which was practised on the part of France, drew this Court out of its usual course and induced it to decree salvage, with the perfect acquiescence of the subjects of neutral States, who were fully sensible of the service that was rendered to them by taking them out of French hands. But this exception did not alter the established doctrine of this Court. It was a deviation which originated in cases of French capture. I am not aware that it has been applied in recaptures from other States."

The learned judge dismissed as inconceivable the idea that these goods had been sent for the use of the belligerent British fleet by the Government of the United States, which had always professed a most guarded neutrality, and which would thus have acted in violation of an express article of its treaty with Spain.

"The property belonged to the American Government, which was not engaged in traffic *lucrandi causa*, but was exporting the present supply only for the use of its own squadron. I am to consider, then, under what

[1] 4 Rob., 156 (1802). [2] 6 Rob., 104 (1805).

aspect such a vessel would have been viewed in the Spanish Court of Prize, in a fair and just light, and not under any violent or capricious feeling, that for the purposes of the present argument may be imputed as likely to divert the learned person who presides in that Court from the performance of his duty. There is no ground for such a surmise. This Court will not lightly entertain a suspicion so injurious to the honour of the Spanish tribunals, or suppose that the known and established principles of justice would not meet with the same candid observance in the Courts of that country as in those of our own."

Meanwhile, under the Consular Government the abuses of the French tribunals, the subject of these complaints, were abated, and so long as the decisions of the Conseil des Prises were enunciated by M. Portalis, the well-known jurist, complaints as to the practical administration of the law by neutrals ceased to have any justification until the Berlin Protocol of 21 November, 1806.

In this document it was declared that every person or country that carried on commerce with England, and thereby favoured her trade, became the accomplice of Great Britain; that the British Isles should be placed in a state of blockade, and that all trade and correspondence with them should be prohibited.

The "Sansom"[1] was an American vessel taken on 25 June, 1807, on a voyage from Amsterdam to Falmouth, by a Spanish privateer (the same decree had been promulgated by Napoleon in Spain) and retaken by a British ship.

In awarding salvage, Sir William Scott said:—

"It is unnecessary to repeat that the general practice of this Court is not to decree salvage on neutral ships recaptured upon the presumption that no peril had been incurred, but that, on being carried into the Courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every State which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if States hold out decrees of condemnation, however unjust, and decrees in which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule has been founded is thus done away with; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation."

It must be observed here that this decree had remained practically inoperative upon American property until the condemnation of the "Horizon" in October, 1807, and that the Convention of 1800 between the United States and France, which was still in force, was entirely inconsistent with the Berlin decree.

The "Horizon," which was captured before the "Sansom," was condemned under the Imperial Rescript of 18 September,

[1] 6 Rob., 410 (1807).

1807, and whether this was explanatory of or additional to the Berlin decree, there appears to be little doubt that the "Sansom" would have been condemned under the provisions of the latter.

The same course was taken by the Supreme Court of the United States. In the case of Talbot *v.* Seeman,[1] salvage was awarded to a United States ship of war for the recapture of the "Amelia," a Hamburg vessel, out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of 18 January, 1798. France and the United States were at this time in a state of partial war.

"It is stated," said Marshall, C.J., in delivering the judgment of the Court, "to be the settled doctrine of the law of nations that a neutral vessel captured by a belligerent is to be discharged without paying salvage; and for this several authorities have been quoted and many more might certainly be cited. That such has been a general rule is not to be questioned. As little is it to be questioned that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of the 'War Onskan' to be founded on this plain principle. . . . The general principle is that salvage is only payable when a meritorious service has been rendered. In the application of this principle it has been decided that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture, and ought not, therefore, to pay salvage.

"The principle is that without benefit salvage is not payable; and it is merely a consequence from this principle which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture? In such a course of things the state of the neutral is completely changed.

"The French decree ordained that 'the character of vessels, relative to their quality of neuter or enemy, should be determined by their cargo; in consequence, every vessel found at sea loaded in whole or in part with merchandise the production of England or her possessions should be declared good prize, whoever the owner of these goods or merchandise might be.'

"Now the 'Amelia' had sailed from Calcutta, and although the whole of Bengal might not have been in possession of Great Britain, there is no reason to doubt that the cargo would have been found by a French Court to have been the product and manufacture of a British possession unless the contrary could have been clearly proved.

"It is not necessary that the loss should be inevitably certain, but it is necessary that it should be real and imminent. It is believed," said the Chief Justice, "to have been so in this case. The captured vessel was of such description that the law by which she was to be tried condemned her as good prize to the captor. Her danger, then, was real and imminent. The service rendered her was an essential service, and the Court is therefore of opinion that the recaptor is entitled to salvage."

[1] 1 Cranch, I (1801).

In the "Actæon,"[1] Sir William Scott commented upon the case of Talbot *v.* Seeman, which had been cited for the proposition that the rescue even of a neutral vessel from the possession of a French captor was a sufficient ground for salvage.

The case went not upon the general principle, but upon the irregular administration of maritime law in the French Courts of Admiralty at that time, by which a vessel once in the hands of a French captor, whether neutral or not, would be in danger of confiscation.

"I cannot, therefore," said the learned judge, "take this case as furnishing a rule on which this Court can rely for giving salvage on American property rescued from the possession of the French on any principle of reciprocal justice. In the early part of the last war the Court held that though America was not in a state of actual warfare with France, yet that American property recaptured was subject to salvage, on the ground that such was the rapacity of the enemy that no vessel had a chance of being liberated from their Courts of Prize under their known disregard to all neutral claims. In that state of qualified hostilities (for war had not been declared by France against America), the demand of salvage was very readily submitted to by the Americans, and the service of recapture thankfully acknowledged. Upon the breaking out of the present war an expectation was entertained that the French Courts of Admiralty would revert to the genuine principles of maritime law, and therefore this Court did not give salvage on the recapture of American property. But if this expectation was cherished for a short time, it soon became notorious that the French Government has long since made it abortive. France has fulminated her decrees against the commerce of the whole world, and has even compelled this country defensively to have resort to measures which abstractedly and originally would be unjust in the highest degree. . . . On the whole of the circumstances of this case, without looking minutely at the varying policy of France, I think there is a very rational ground to apprehend that the French Prize Courts would have condemned these ships as legal capture, and therefore I shall pronounce the usual salvage."

The same practice was followed in France before the Revolution. For instance, the "Nostra Signora d'Ovalle,"[2] a neutral Portuguese vessel captured by an English privateer and recaptured by a French privateer, was restored on the ground that there was no cause to presume that it would have been confiscated in England, and the recapture had taken place within the twenty-four hours. The French privateer was condemned in damages and interest.

The "Mercury"[3] was a neutral Swedish vessel captured by an English privateer and recaptured by a French privateer within the twenty-four hours. It was ordered to be restored by the Conseil des Prises.

[1] Edw. Ad., 254 (1810).
[2] Code des Prizes, t. II, p. 1021 (1781).
[3] *Ibid.*, p. 789 (1781).

In the case of "L'Argos,"[1] a neutral Swedish vessel captured by an English privateer and recaptured nine days afterwards by a French privateer, the Conseil des Prises decreed a replevy, on condition of the privateer receiving one-third for salvage. On appeal this decree was reversed by the King, who, on 8 April, 1782, held that there was no claim for recapture, and condemned the recaptor in all the costs, damages, and expenses on the ground that the prize would not have been confiscated in England.

(3) Recapture or rescue from an enemy.—By the Civil Law of Rome, captives who returned to their native country were entitled to be reinstated in their original legal status. Of such persons it was said, "Si reversi fuerint, omnia pristina jura recipiunt." Thus on his return the father, for instance, regained his potestas over his family, "Quia postliminium fingit eum, qui captus est, semper in civitate fuerit." This phrase is derived from *post* and *limen*, the latter term being extended from the threshold of a house to the boundary of the empire.[2] But things recaptured from the enemy were regarded by the Civil Law as good prize, since by capture the original owner lost his ownership with the possession. To this rule, however, ships of war amongst other things formed an exception, and to them the doctrine of *jus postliminii* applied.[3]

This principle has naturally found its way into international law, but it is remarkable that of all the ancient maritime codes, the Consolato del Mare alone deals with the case of recaptures.

In the case of ships recaptured before they had been taken to a place of security by the original captors, it was provided by chapter 287 as follows:—

"1. If a ship is taken by the enemy, and afterwards another ship of a friend comes up and effects a recapture, the vessel and all that is in her shall be restored to the former proprietors on payment of a reasonable salvage for the expense and trouble and danger that have been incurred; but this is to be understood of recaptures effected within the seigniory or territorial seas of the country to which the captured vessel belongs or before the enemy had secured the vessel to himself in a place of safety."

Upon this section Grotius says:—

"It has been established as a rule of nations that he is understood to have captured a thing who detains it in such a manner that the other has lost probable hope of recovering it . . . so that things are considered as captured when they are brought within the boundaries or *infra praesidia* of the enemy. A thing is lost in the same way in which it is recovered by *postliminium*."[4]

[1] *Ibid.*, 1044 (1779).
[2] Inst. I., XII, 5.
[3] Puchta, Inst. II, 687, secs. 241–2.
[4] Lib. III, c. VI, sec. 3, 1.

The possession of the original owner was not lost until the property was brought *infra praesidia* of the captor. "Whence," continues Grotius, "it seems to follow that at sea ships and other things captured are not considered to be captured until they are brought into dock or harbour, or to the place where the fleet is; for then their recovery becomes hopeless."[1]

But he adds that it had recently become the established European practice for twenty-four hours' possession by the captor to divest the original owner of his property. And such was the general rule according to Loccenius when he wrote:—[2]

"Hodie naves ab hoste captae communi inter Christianos et Europaeos populos sive jure sive consuetudine postliminio non recipiuntur, si hostis eas non eodem die navali pugnâ iterum amisit, sed per viginti quatuor horas in potestate victoris fuerint."

Vattel almost entirely follows the same view.[3]

In the case of ships recaptured in the enemy's territory or in a place of security, the Consolato provided:—

"(2) If the recapture has been effected within the enemy's territories or in a place where the enemy was in entire possession of his prize—that is, in the place of security—the proprietors shall not recover, nor shall the recaptors claim any salvage; for they are entitled to the whole benefit of the recapture without opposition from any rights of seigniory or the claims of any person whatever."

In commenting upon these sections, Sir William Scott in the "Ceylon,"[4] which had been recaptured from the French, said:—

"It cannot be forgotten that by the ancient law of Europe the *perductio infra praesidia, infra locum tutum*, was a sufficient conversion of the property; that by a later law, a possession of twenty-four hours was sufficient to divest the former owner. This is laid down in the 287th article of the "Consolato del Mare," in terms not very intelligible in themselves, but which are satisfactorily explained by Grotius and by his commentator Barbeyrac in his notes upon that article."

The following passage to the same effect is then quoted by the learned judge:—

"Sane in libro qui inscribitur Consulatus Maris C. 287, ita, ut modo dicebam res definita est: nam is, qui navem et onus ab hoste recuperavit, jubetur navem et onus restituere pristino domino, salvo tamen servaticio, idque servaticium ut justum sit, constituitur pro modo operae et impensae in recuperationem factae praeterita omni distinctione, quamdiu navis onusque in potestate hostium fuerint. Recte autem ibi additur, eam restitutionem dum taxat obtinere, si navis nondum fuerit deducta in locum tutum, sed si in locum tutum dominio sic plane et plene in hostem translato, navem mercesque deinde recuperatas ex asse recuperatori

[1] Lib. III, c. VI, sec. 2.
[2] "De Jure Marit.," lib. II, c. IV, sec. 4.
[3] Tom. II, lib. III, ch. ix., xiii., xxiv.
[4] 1 Dod. "Adm. Rep.," 105 (1811).

cedere. Quae apprime conveniunt cum his quae hoc capite disputavimus. Vellem omnia, quae in illa farragine legum nauticarum reperiuntur, aequae proba recta essent sed non omnia ibi sunt tam bonae frugis."[1]

"In Lord Stair's decisions[2] also," continued the learned judge, "the same rule is laid down as the rule of law in Scotland. According to Valin[3] a similar practice prevailed in France, and Crompton in his "Treatise on Courts"[4] states it as the ancient law of this country that a possession of twenty-four hours was sufficient conversion of the property, and that the owner was divested of his property, unless it was reclaimed *ante occasum solis*. So that according to the ancient law of England, which was in unison with the ancient law of Europe, there was a total obliteration of the rights of the former owners. It is true that this rule has since been receded from by this country, when its commerce increased. During the time of the Usurpation, when England was becoming commercial, an alteration was effected by the Ordinance of 1649, which directed a restitution upon salvage to British subjects; and the same indulgent rule of law continued afterwards, when this country became still more commercial; but the common law still prevailed and controlled the provisions of the statute, where the enemy had fitted out the prize as a ship of war. In the most recent change of the law it is determined that a vessel belonging to a British subject loses her character on capture by the enemy and subsequent conversion into a ship of war."

Other writers have extended the principle still further, and have contended that the original owner is divested of his property from the moment of its capture.[5] And, lastly, a fourth rule of practice was adopted by England and the United States that the property of the owner was only extinguished by a sentence of condemnation in a properly constituted prize court. In the case of privateers this rule was relinquished. De Martens, on the contrary, is opposed to all these views. He doubts the principle upon which they are based, viz., that the law of war grants to the captor a right of full property to the total exclusion of the first proprietor. The maxim of civil law, *quod occupatio bellica sit modus acquirendi dominium*, only regarded warlike seizure as a mode of acquiring property, and did not consider at all the rights of the original proprietor.

Property legally acquired is lost only, says De Martens—

(*a*) By a simple abandonment or cession.

(*b*) By a total destruction of the object.

(*c*) By such a total loss of possession that every reasonable hope of recovering it disappears and no further trace of the original title remains.

But as long as the object exists, the proprietor always enjoys the hope of regaining his property.

[1] Quæst., Jur. Pub., lib. I. c. v.

[2] Vol. II, 507 (1677).

[3] Ordonnance, 1681, sec. 8.

[4] Court d'Admiraltie d'Angleterre, 91.

[5] Chevalier D'Abreu, "Traité des Prises," p. 1, c. iii; Weskett, "Theory of Insurances," p. 423; Burlamaqui, "Droit Politique," p. 607, n. 16; Luzac on Wolf, sec. 1204.

The captor may be entitled to dispose of the prize in the same manner as the proprietor could have done, although without enjoying a real property, but he cannot extinguish the rights of the proprietor, and these rights lie dormant until the conclusion of peace.

And this right of war, being personal to the captor, cannot enure to a third person who acquires the prize during the war, and the proprietor is consequently entitled to prosecute his rights against him. The recaptor, therefore, having acquired no rights of ownership, must restore the property to the original owner.

The following rule has been formulated by De Martens :—

"According to the law of nature, without making any distinction between conquest and booty or prize, the goods taken by the enemy, however legal that capture may be, however certain the possession of them may be, do not become his property till the moment of peace; and that during the whole course of the war it may be claimed by the first proprietor from the hands of every third possessor."

And where the recapture is made against the will of the captor, the recaptor, who can neither receive any better title from the captor than he had nor urge the law of war against his own subjects or fellow-citizens or against the subjects of a neutral or allied Power, ought, on the demand of the proprietor, to restore the object to which the latter has not ceased to be entitled.

And since the recaptor was under no obligation to incur danger, trouble, and expense to enrich another, the proprietor ought to indemnify him for them.

This reasoning is thus formulated :—

"That every recapture made at any period of the war whatever, whether the capture is legal or illegal, whether the recaptor is a sovereign or a privateer, ought to be restored in every case to the original proprietor, on a just repayment of the costs and damages of the recaptor, unless the illegality of the recapture precludes the recaptor from the privilege of demanding an indemnity."[1]

But although maintaining this theory, De Martens candidly admitted that it was opposed to the general law and practice.

But De Martens' theory is strongly confirmed by the rule of rescue. Supposing the proprietor is not on board and the crew effect a rescue, the prize does not belong to the crew, although it may have been in the enemy's possession more than twenty-four hours, or even have been brought *infra praesidia* of the enemy. In either case the property is restored to the proprietor, which appears to prove that he had never lost his ownership.

By section 3 of c. 287 of the "Consolato"—

[1] Essay on Captures and Recapture, trans. T. H. Horne (1801), c. iii.

"If an enemy, having made a capture, quits his prize on the appearance of another vessel, either from fear or from any doubt that he may entertain of her, and the vessel on whose account the captured ship was abandoned takes possession of the deserted vessel and brings her into port, she must be restored to the proprietor or his heirs without opposition, by agreement between the parties, and if they cannot agree, by the arbitration of creditable persons."

And by section 4, where the owner abandons his ship through fear of the enemy, but it is not taken possession of by the enemy nor taken by him into a place of security, the finders are not entitled to the vessel or cargo, but by the use and custom of the sea they may demand a reasonable compensation to be settled by agreement or arbitration—

"For it is not fit that any one should endeavour to take undue advantage of the misfortunes of another, since he cannot foresee what may happen to himself, and because every one should be ready to submit his disputes, especially in cases like the present, to the arbitration of two unexceptionable persons."

Sections 5, 6, and 7 contain provisions to meet cases in which persons fit out vessels with the intention of making fraudulent claims for salvage, or by any deceit or fraud bring about a situation in which they may pose as rescuers entitled to salvage.

By section 8, if the enemy *voluntarily* abandoned his prize, and not through fear or apprehension of any other vessel, the finders on bringing the prize into a place of safety do not thereby acquire any property in it, but are entitled to a reasonable salvage to be fixed at the discretion of reputable persons of the place to which the vessel is brought. And by section 9, if at the expiration of a reasonable time no owner is forthcoming, the finders receive one-half of the proceeds, and the moiety is divided under c. 249 between the law of jurisdiction and *pious purposes* for the repose of the soul of the proprietor.

By section 10, where the enemy is obliged, through stress of storm or fear of another vessel, to abandon possession of his prize, the rule is the same as when he abandons it voluntarily.

Finally, by sections 11 to 22 inclusive, where the prize is either ransomed of the enemy or of others, or is purchased out of the enemy's hands, it must be ascertained whether the prize had been taken to a place of safety or not. In the first case, the purchaser may keep the prize without restitution; in the second, he must offer it to the proprietor in consideration of receiving from him the ransom or purchase-money together with a reward, if at the time of the ransom the enemy was already master of the prize in such a manner that no other means of saving it existed.

The above sections are thus summarized by De Martens :—

"1. Suppose generally the case of a ship captured by its enemy; at that period so extensive a right attached to the capture of friendly ships was unknown, and it is doubtless for that reason that no mention is made respecting the making of restitution to allied, friendly, or neutral Powers.

"2. That they establish generally the principle that the enemy becomes proprietor of his prize as soon as he has conducted it into a place of safety without respect of him; consequently,

"3. If before that period the ship is recaptured by force or (which cannot happen in this case) if it is abandoned, it shall be restored to the original proprietor in consideration of a reward; but if after that period it is recaptured or purchased, it shall belong wholly to the recaptor or purchaser.

"4. That it is allowable to ransom the ship, but only in case there were no other means of saving her.

"5. That the claim of salvage is not fixed at any certain part of the recapture, but in proportion to the expenses and damages.

"6. That in case of differences between the recaptor and the proprietor skilful persons (*prud'hommes*) shall decide."[1]

Whatever universal force the "Consolato del Mare" may have had originally has been impaired by municipal law and international agreements. It becomes necessary, therefore, to examine the law of various maritime nations, and the treaties by which they are mutually bound.

France.—By French law a distinction is drawn between recapture by a privateer and by a public vessel. When, therefore, a French vessel is recaptured by a privateer before it has been twenty-four hours in the enemy's possession, it is restored to the proprietor with its cargo upon payment of one-third its value for salvage, but if recaptured after twenty-four hours it belongs wholly to the recaptor.[2] If the capture, however, is made by a public ship under the old law, if the recapture was made before the twenty-four hours, one-third was adjudged to the Crown; if after that period, the whole went to the Crown, the crew being rewarded in proportion to the value of the prize.[3] But the practice was to restore such prizes to the proprietors in consideration of a bounty to the crew.[4]

Under the new law the proportion of salvage is one-thirtieth and one-tenth respectively.[5]

Where the prize is abandoned by the enemy without being

[1] "Captures and Recaptures," p. 153.
[2] Edict of March, 1584; Ord., 1681, Art. LXI; Ord., 15 June, 1779, Art. VIII.
[3] Ord., 15 June, 1779; Ord., 9 January, 1780.
[4] Valin, "Traité des Prises," p. 88; Emerigon, "Traité de Assurances," chap. XII. sec. 23, p. 495.
[5] "Arrêté du 2 Prairial," an XI, Art. LIV.

recaptured, or if in consequence of storms or other accident it comes into the possession of French subjects before it has been carried into an enemy's port, it must be restored to the proprietor, who may claim the same within a year and a day, although it may have been more than twenty-four hours in the enemy's hands.[1] In this case Valin contends that one-third may be demanded for salvage,[2] whilst Emerigon maintains the contrary.[3]

These regulations, however, were silent as to recaptures belonging to allies and auxiliaries. De Martens thinks designedly so, although Emerigon, who relied on Vattel, considered that the same restitution ought to be made to them as to subjects.

The matter was settled in 1801, when on 9 February the Conseil des Prises condemned as good prize to the recaptor two Spanish vessels recaptured from the common enemy by a French privateer after the expiration of twenty-four hours. If the recapture had been effected by a public ship, whether before or after the twenty-four hours, the prize would have been restored in accordance with the ancient practice in the case of subjects' property.[4]

By the treaty with the United Provinces of the Low Countries, 1 May, 1781, ratified on the 27th, the new law was made applicable. In December, 1780, war had broken out between the Low Countries and Great Britain, and on 2–4 May a fleet of Dutch merchantmen, captured by Admiral Rodney, were recaptured by a French squadron off the Scilly Islands. The greater part of the ships and cargoes were adjudged to the recaptors by the Conseil des Prises, and upheld on appeal, upon the grounds apparently that the character of hostile possession was indelibly fixed, that the vessels possessed English commissions, and that the treaty was not retro-active.

Similar provisions to those contained in the treaty of 1781 appear in Article XXXIV of the treaty of 1786 with Great Britain.[5]

In the Crimea War it was thought that Article XXXIV of this treaty would be applied. The Convention of 16 May, 1854, was silent as to recaptures, but by Article III it was stipulated that—

> "In cases of the capture of a merchant vessel of one of the two countries, the adjudication of such capture shall always belong to the jurisdiction of the country of the captured vessel; the cargo shall be dealt with as to the jurisdiction in the same manner as the vessel."

[1] Ord., 1681, Art. IX.
[2] "Traité des Prises," p. 101.
[3] "Traité de Assurances," p. 503.
[4] Pothier, de Propriété, No. 100.
[5] De Martens, "Rec.," Vol. II, p. 127.

Spain.—The old law of Spain corresponded with that of France from the accession of the House of Bourbon to the Spanish throne. The ordinances of 1621 and 1718 only mention recaptures of vessels belonging to subjects, and the ordinance of 1633 only gives vague directions for the restitution to persons who are known. By the ordinance of 1 July, 1779, foreigners are put on the same footing as subjects :—

"The ships of neutral or allied subjects, which the enemy's privateers may have captured, shall be restored to the proprietors, together with their cargoes, if the recapture has been within twenty-four hours, in consideration of one-third of the value, which shall be given to the recaptor."

The earliest treaty relating to recaptures is that of 25 November, 1676, with the United Provinces of the Low Countries, which stipulated that—

"If a ship shall be recaptured from the enemy by His Majesty's ships or by privateers, if the recapture is made forty-eight hours after it shall have been in the enemy's power, the recaptors shall have one-fifth of the ship and cargo. And if the recapture is made forty-eight hours after the first forty-eight hours, they shall have one-third of the value, and if made after the said period one-half."[1]

By Article XLIII of the treaty of 1 May, 1725, with Austria, it was stipulated that when a ship belonging to the subjects of one Power has been taken by any common enemy and retaken from him by any ship of war or privateer of the other, if the recapture is made within forty-eight hours after it shall have been in the enemy's hands, the fifth part of the ship and cargo shall belong to the recaptor; that if the recapture is made within the *preceding* hours he shall have one-third, and if made later, one-half.[2]

By the treaty of alliance of 15 May, 1793, with Great Britain, the two Powers agreed to make it a common cause to protect mutually their vessels on both sides—to assist each other whenever one of them should be attacked or injured by land or sea. So long, therefore, as this alliance subsisted, each Power was bound to restore vessels without any distinction between their own subjects and those of its ally.[3]

Just prior to this treaty the "St. Jago,"[4] a rich Spanish vessel from Lima, was captured by the "Dumouriez," a French privateer, on 5 April, 1793, and recaptured by H.M.S. "Edgar" on the 14th, and brought into a British port.

In the suit between the recaptors and the attorney of the King of Spain, the latter based his claim upon the equitable principle of

[1] Dumont, VII, part I, p. 321.
[2] Dumont, VIII, part II, p. 118.
[3] De Martens, "Rec.," V, p. 150.
[4] De Martens, "Captures and Recaptures," p. 189.

restitution, upon the fact that Spain made no distinction between its own and foreign subjects, and upon the recent treaty.

It was decreed that the "St. Jago" and its cargo should be restored after deducting the costs of suit and one-eighth in lieu of salvage, on condition that the King of Spain would not delay to declare by a public act, that all ships, together with their cargoes, belonging to the English who are or shall be recaptured by the ships of the King of Spain or by Spanish privateers, shall be restored on the same footing to Great Britain; and if not, the "St. Jago" should be considered as good prize to the recaptors.[1] With this decision De Martens is profoundly dissatisfied. Neither by Spanish law nor by treaty (for the recent treaty was not in force at the date of the recapture) was it justified. But he appears to have forgotten that by French practice recaptures made by public ships were restored, although by law the recaptors were entitled to them, and that Spain had followed the example set by France.

Portugal.—The ordinances of 1704 and 1796 followed the French law which had also been introduced into Spain, but by the ordinance of 10 May, 1797, the rule of twenty-four hours' possession was abandoned, and the property was restored on payment of one-eighth to the recaptor if a public ship, and one-fifth if a privateer.

The United Provinces of the Low Countries.—By the ordinance of 14 July, 1625, a vessel and its cargo were restored to the proprietor if retaken by a privateer within twenty hours on payment of one-eighth, if within forty-eight hours of one-fifth, and if later still of one-third. By the ordinance of 22 July, 1625, these provisions were extended to recaptures made by public ships.

A number of ordinances were subsequently passed varying these conditions, but in none is there any reference to others than subjects, until the ordinance of 28 July, 1705, which directs that as to recaptures of allied and neutral ships privateers shall be content with what has been or may be agreed with them. The only treaty, however, which unmistakably refers to such recaptures is that with the United States of 8 October, 1781, by which recaptures made by privateers are to be restored on payment of one-third in lieu of salvage if made within twenty-four hours, and if taken after that period, the whole to go to the recaptor. But where the recaptor is a public ship, the prize is to be restored if made within forty-eight hours on payment of one-thirtieth, and if later of one-tenth.[2]

[1] "Public Advertiser," Nos. 18,453 and 18,506.
[2] De Martens, "Captures and Recaptures," 197.

Denmark.—The Danish Code of Christian V[1] directs that the recapture after twenty-four hours' possession shall be good prize to a privateer, but if made within that period, it shall be divided equally between the proprietor and the privateer.

This law only refers to the property of Danish subjects, but by the ordinance of 28 March, 1810, Danish or allied property is restored upon payment of one-third in lieu of salvage, without any regard to the length of time the prize may have been in the enemy's hands.

The treaties with France and Spain have already been referred to. The treaty with Genoa of 30 July, 1789, calls forth from De Martens unstinted applause. "Would to heaven," he exclaims, "this sound philosophy were that of all laws and of all treaties."

By Article XI, it is stipulated—

"That if a neutral merchant ship, seized on the seas by a ship of war or privateer, be recaptured or recovered by a ship of war or privateer of the contracting party, who is at war with the nation of the first captor, that ship shall be immediately set at liberty to pursue its voyage, under whatever pretext it may have been detained in the first place, and without its recaptor being able to claim any reward or part in the ships or their cargo, whether it may have been for a longer or a shorter time in the power of the first captor, since no neutral ship can ever be considered as a prize until it has been legally condemned in a court of admiralty."

Sweden.—The ordinance of 1667 of Charles XI enacts that in case a ship belonging to Swedish subjects after having been taken by the enemy should be retaken, the recaptor shall have two-thirds of its value and one-third shall be restored to the proprietor, without respect to the time which it may have been in the enemy's hands.

This law appears to refer to privateers only, but from the law of 1755 public ships would appear to have had the same rights.

By the ordinance of 1788, the rate of salvage was reduced to one-half.

The Hanseatic Towns.—The ancient maritime laws of the Society of the Hanse Towns contain no regulations relating to recaptures, but the laws of the city of Lubeck directed that if a ship be retaken by a private vessel the recaptor should keep the prize, and if retaken by a public ship of the city, it should be restored wholly to the proprietor in consideration of a reward.

Great Britain.—The earliest statute relating to recapture of property of British subjects appears to be that of 1692,[2] made

[1] Cod. Leg. Dan., lib. IV, ch. VII., sec. 6.

[2] 3 & 4 W. & M., c. 25.

shortly after the treaty of 1689 with the United Provinces of the Low Countries. By this statute, if the recapture were made by a public ship the rate of salvage should be one-eighth; if made by a privateer or other ship one-eighth, if recaptured within twenty-four hours; one-fifth within forty-eight hours; one-third within ninety-six hours; and one-half after that period without any deduction whatsoever.

These regulations were repeated by 13 Geo. II, c. 24; 17 Geo. II, c. 34; and 29 Geo. II, c. 34.

In the American War of Independence a curious departure was taken by the Act of 1776,[1] which restored to the proprietor of British property captured by the rebels and recaptured by British public ships upon payment of one-eighth, without regard to the time of the enemy's possession. This was extended to privateers by the Act of 1777.[2] At the commencement of the war the rebels were regarded as illegal enemies or pirates, and so the practice followed in their case was adopted.

Nevertheless the same rule was followed in the wars with France in 1778, with Spain in 1780, and with the United Provinces in the same year.

Thus by the Act of 1779,[3] Article IV of the Act of 1776 is repeated, and if the prize has been set forth by the enemy as a man-of-war, the recaptor is entitled to one-half as salvage. The Act of 1780[4] further adds that with respect to recaptures not worth the expense of a suit, the matter may be compromised, provided it is mentioned to the Court.

The statutes of 1793,[5] 1794,[6] and 1797[7] contained similar provisions.

The present law is contained in the Prize Act, 1864,[8] which is based upon 43 Geo. III, c. 160 and 45 Geo. III, c. 72, and whereby it is provided as follows:—

"Sec. 40. When any ship or goods belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of Her Majesty's ships of war, the same shall be restored by decree of a Prize Court to the owner, on his paying as prize salvage one-eighth part of the value of the prize, to be decreed and ascertained by the Court, or such sum not exceeding one-eighth part of the estimated value of the prize as may be agreed on between the owner and the recaptors and approved by order of the Court: Provided that where the recapture is made under circumstances of special difficulty or danger, the Prize Court may, if it thinks fit, award to the recaptors as prize salvage a larger part than one-eighth, but not exceeding in any case one-fourth part of the value of the prize: Provided also that where a ship

[1] 16 Geo. III, c. 5.
[2] 17 Geo. III, c. 7.
[3] 19 Geo. III, c. 67.
[4] 20 Geo. III, c. 23.
[5] 33 Geo. III, c. 34.
[6] 34 Geo. III, c. 70.
[7] 37 Geo. III, c. 109.
[8] 27 & 28 Vict., c. 25.

after being so taken is set forth or used by any of Her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.

"Sec. 41. Where a ship belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is retaken from the enemy by any of Her Majesty's ships of war, she may, with the consent of the recaptors, prosecute her voyage, and it shall not be necessary for the recaptors to proceed to adjudication till her return to a port of the United Kingdom.

"The master or owner or his agent may, with the consent of the recaptors, unload and dispose of the goods on board the ship before adjudication.

"In case the ship does not, within six months, return to a port of the United Kingdom, the recaptors may nevertheless institute proceedings against the ship or goods in the High Court of Admiralty, and the Court may thereupon award prize salvage as aforesaid to the recaptors, and may enforce payment thereof, either by warrant of arrest against the ship or goods, or by monition and attachment against the owner."

It was provided by the treaty of 22 October, 1691,[1] with the United Provinces of the Low Countries—

"That in case any ship belonging to the King of Great Britain or to the States General or to their subjects, should be captured by any ships of war or privateers belonging to a hostile prince or State, and recaptured by the ships of the King or States General, or by a privateer duly authorized by the said King or the said States, before such vessel has been conducted *infra praesidia*, that is to say, into any enemy's port or into a fleet carrying its flag, such ship together with all its cargo, cannons, and rigging, shall be restored to the first proprietor, on his paying in lieu of salvage as follows: that is to say, if it is recaptured by a privateer before forty-eight hours after the capture he shall pay one-fifth, before ninety-six hours one-third, after ninety-six hours one-half of the value of the ship and of its cargo, cannons, and rigging.

"In case ships are recaptured by a ship of war before the enemy has conducted them *infra praesidia*, the eighth part shall be paid instead of salvage."

The treaty of 1786 with France has already been mentioned, and the treaty of 1793[2] with Portugal appears to contemplate the mutual restitution of recaptures. That with Spain of 15 May, 1793, has also been already referred to.

Although considerable doubt has been thrown upon what rule was followed in England in early times, it seems on the whole more probable that the general European practice of condemning property to the recaptor after twenty-four hours' possession by the enemy was followed.

It was asserted by Grotius, on the authority of Albericus Gentilis,[3] that England had adopted the rule of twenty-four hours.

[1] Dumont, VII, part II, p. 301.
[2] De Martens, "Rec.," V, 210.
[3] Lib. I, c. III.

But Gentilis was here speaking of military booty. However that may be, the ancient law held—

"That if an enemy dispossessed an Englishman and another Englishman took the booty from the enemy, the former owner shall lose his property so gained in battle, unless he comes and claims in the same day *ante occasum solis*, and neither the king nor the admiral nor the former owner shall have any claim to it."[1]

Although the word "admiral" is used, the original dictum in the Year Book in the passage to which it is applied relates to land capture. It is possible that Grotius was justified in his assertion by the passage in the Dutch Resident's letter of 17 March, 1656—

"That after many suits and afterwards appeals had in the council of the king, *anno* 1632, it was understood that *jure postliminii* no ships ought to be restored which had been twenty-four hours in the power of the latter."

As Sir William Scott observed in "L'Actif,"[2] as Great Britain became more commercial, she departed from the old law and created a new and peculiar law for herself in favour of merchant property recaptured, introducing a policy not then adopted by other countries, and different from her own more ancient practice. By an ordinance of 1649, restitution upon salvage to British subjects was recognized, and Molloy cites several cases in the seventeenth century in which a recapture made by a public ship was always restored to the proprietor upon salvage, whilst that made by privateers or other individuals was assigned wholly to the recaptors, provided it was brought *infra praesidia* without any regard being paid to the twenty-four hours' possession by the enemy.[3]

Park, indeed, goes further, and asserts that the proprietor was, until the statute of 1692, entitled to claim his property until it had been condemned, irrespective of the time of possession by the enemy.[4] This view is supported by Sir Leoline Jenkins, Judge of the Admiralty, who in 1672 said he could find no trace of the twenty-four hours' possession in the earliest part of that century. On a case referred to him he reports:—

"In England we have not the letter of any law for our direction; only I could never find that this Court of Admiralty, either before the late troubles or since, has in these cases adjudged the ships of one subject good prize to another; and the late usurpers made a law in 1649 that all ships rescued, whether by their own men-of-war or by privateers, should be restored on paying one-eighth salvage, without any regard to the time

[1] 7 Ed. IV, 14.
[2] Edw. Adm. Rep., 184 (1810).
[3] "De Jure Maritima et Navali," c. 1, sec. 8.
[4] "System of Insurance," c. IV, p. 29.

such ship had been in the possession of the enemy, or to any other circumstance, unless the ship were made a man-of-war by the enemy; and in that case a moiety went for salvage, but the ship was still to be restored. Whether the usurpers intended this as a novelty or an affirmance of the ancient custom of England I will not take upon me to determine, only I will say, condemnation upon the enemy's possession for twenty-four hours is a modern usage."[1]

In Goss *v.* Withers,[2] Lord Mansfield, after referring to the conflicting opinions of jurists and the varying practice of nations, says that he has taken the trouble to inform himself of the practice of the Court of Admiralty in England before any Act of Parliament commanded restitution or fixed a rate of salvage.

"I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and he informs me that they hold the property not changed, so as to bar the owner in favour of a vendee or recaptor *till* there had been a sentence of condemnation; and that in the reign of Charles II, Sir Richard Floyd gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer after she had been fourteen weeks in the enemy's possession, because she had not been condemned. Another case upon the same principle is cited at the end of Assievedo *v.* Cambridge, 1695, after a long possession, two sales, and several voyages."

In this last case Lord Mansfield was scarcely correct. The vessel was retaken before being carried *infra praesidia*, and it was held that—

"The law is clear that not the length of time, but the bringing *infra praesidia* into a place of safety is that which diverts the property."[3]

Lord Mansfield held the same view more than twenty years later. In Lindo *v.* Rodney,[4] where Admiral Rodney and General Vaughan had seized the island of St. Eustatius, he said: "The end of a Prize Court is to suspend the property till condemnation, and referring to the treaties between Henry VII and Louis XII of 1498,[5] confirming that made with Charles VIII, and of Henry VIII and Francis I of 1526,[6] he said these demonstrate—

"That no property vests in any goods taken at sea or on land by a ship or her crew, till a sentence of condemnation as good and lawful prize."

And this appears to be the better opinion, viz., that until condemnation the *jus post liminii* continued, and the proprietor was

[1] "Life of Sir L. Jenkins," Vol. II, 770.
[2] 2 Burr., p. 694 (1758). [3] Lucas, 79.
[4] Reported in Le Caux *v.* Eden, 2 Douglas, 613 (1781).
[5] Rymer, Vol. XII, 690. [6] *Ibid.*, XIV, 147.

entitled, on payment of a reasonable salvage to the recaptors, to a decree of restitution.[1]

But by subsequent Prize Acts, as already stated, salvage upon recapture was fixed at certain rates, according to the period during which the prize was in the enemy's possession, until by 43 Geo. III, c. 160, and following Acts, the *jus post liminii* was continued for ever, so that the original proprietor, *provided he was a British subject*, could in all cases claim restitution even after a decree of condemnation, irrespective of any period of possession by the enemy, provided only the prize had not been set forth by the enemy as a ship of war. And this is the law to-day.

Setting forth as a ship of war.—What is a setting forth such as to disentitle the proprietor has been discussed in the case of "L'Actif,"[2] which was a British vessel, at the time of recapture sailing under French colours as a merchantman on a voyage from L'Orient to Nantes with a cargo of sugar, cotton, and other goods. She had no commission of war and no armament, but she had previously cruised as a privateer against the commerce of Great Britain. In refusing to restore the ship to the original owner, Sir William Scott, in construing the words of the statute of 1805,[3] "if such ship or vessel so taken shall appear to have been, after the taking by His Majesty's enemies, by them set forth as a ship or vessel of war," said :—

"I think it more probable that when the former character of a vessel had been once obliterated by her conversion into a ship of war the Legislature meant to look no further. From that moment the title of the former owner and his claim to restitution were entirely extinguished, and could not be revived again by any subsequent variation of the character of the vessel. His title being once gone is gone for ever."

The "Ceylon"[4] was a British East Indiaman which had been captured by some French frigates and carried to the Isle of Johanna, where she was refitted and supplied with two additional carronades and a French crew of seventy men. She was then conveyed to the Isle of France, where she was attacked by the British frigate "Nereid" and the guns of the Isle du Passe, and having fired several shots in return at the frigate and fort, she passed to her anchorage at Port South East, where she was again attacked by the British squadron, when with the assistance of other French vessels, she succeeded in repelling the attack and in taking or destroying the British squadron. She was afterwards carried to Port Napoleon, where she was dismantled and fitted out

[1] Marshall, "Marine Insurance," 4th ed., 436.
[2] 1 Edw. Adm., 185 (1810).
[3] 45 Geo. III, c. 72, s. 7.
[4] 1 Dods. Adm., 501 (1811).

as a prison ship, in which state she was discovered upon the capture of the island.

In condemning this vessel to the recaptors, Sir William Scott said :—

"It is no necessary part of the interpretation [of the section] that she should have been carried into port and sent out with a formal and regular commission; it is sufficient if she has been used in the operations of war and constituted a part of the naval military force of the enemy. *Non constat* that there was not a regular commission of war in the present case; that must remain a matter of conjecture only, since all the ship's papers are lost. I hold it, however, to be unnecessary that she should have been regularly commissioned; it is enough that she was employed in the public military service of the enemy by those who had competent authority so to employ her."

The "Horatio"[1] was a British slave ship captured on the coast of Africa by three French privateers, which put men on board and fitted her out, as it was suggested, as a privateer.

In restoring her to the original owner, Sir William Scott held that this was not a case of setting forth within the section. There was no commission, no arming of the vessel, she being originally armed as a slave ship. The mere act of putting an additional number of men on board in this manner by an enemy privateer would not have the effect of defeating the title of the original owner.

The "Georgiana"[2] was a British ship with a cargo of oil, carrying eight guns and twenty-five men, captured in the South Seas by the American frigate "Essex." The captain of the "Essex," without bringing the "Georgiana" into port, supplied her with ten additional guns and sixty men. She then cruised under one of his officers, and captured three British vessels. When recaptured by the British sloop of war "Barossa," only four guns and fifteen men were found on board.

In condemning this vessel as prize to the recaptors, Sir William Scott said :—

"It has been usual for the Court to look in the first place for the commission of war, because where that is to be found nothing more is wanted. Where the ship has been armed without any authority, that has not of itself been held sufficient to bring the case within the exception of the clause; for the Court has never gone so far as to say that a mere arming will do, notwithstanding the marginal note to the Prize Act which 'seems to make using as a ship of war' sufficient. The Court has always required that there should be some semblance of authority, although it has not thought it necessary, in the cases which have been brought before it, to look very minutely into the foundation of that authority. If sailors were merely to put arms on board a vessel and go out and cruise, I think there would be a deficiency of authority, and that the vessel could not be

[1] 6 Rob., 320 (1806). [2] 1 Dod. Adm., 397 (1814).

considered as 'set forth for war' according to the true construction of the Act of Parliament. But where there is a fair semblance of authority and nothing upon the face of proceedings to invalidate it, *that* the Court has been in the habit of considering sufficient. In the case of the 'Castor' before the Lords of Appeal,[1] the authority of the commander of a fleet was considered as sufficient, 'the vessel was not carried into port or adjudged.'"

The distinction between the authority of the commander of a fleet and of the commander of a single frigate did not appear to the learned judge to be very material. Either might equally be presumed to be vested with sufficient authority.

Recapture of the property of allies.—This is governed by the rule of reciprocity, which is fully discussed and defined by Sir William Scott in the "Santa Cruz."[2] This was the case of a Portuguese vessel taken by the French on 1 August, 1796, and retaken by English cruisers on the 28th. It was the test case of several of the same nature as to the general law of recapture between Great Britain and Portugal.

In delivering judgment, Sir William Scott said :—

"It is certainly a question of much curiosity to inquire what is the true rule on this subject. When I say the *true rule*, I mean only the rule to which civilized nations attending to just principles ought to adhere. For the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with proper force and authority of a general law.

"It may be fit there should be some rule, and it might be either the rule of immediate possession or the rule of pernoctation and twenty-four hours' possession; or it might be the rule of bringing *infra praesidia;* or it might be a rule requiring an actual sentence of condemnation: either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another; but the fact is that there is no such rule of practice. Nations concur in principle, indeed, so far as to require firm and secure possession; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed on any principle as fit to form the rule of law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. That obligation could arise only from a reciprocity of practice in other nations, for from the very circumstances of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct. For instance, were there a rule prevailing among other nations that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule that a bringing *infra praesidia*,

[1] May, 1795. [2] 1 Rob., 49 (1798).

though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right. The effect of adhering to such a rule would be gross injustice to British subjects, and a rule from which gross injustice must ensue in practice can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent States.

"If I am asked under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be to apply, in the first instance, the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just. To the recaptured it presents his own consent bound up in the legislative wisdom of his own country; to the recaptor it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among his own countrymen would restore, it brings an obvious advantage; and even in the case of immediate restitution under the rules of the recaptured, the recapturing country would rest secure in receiving reciprocal justice in its turn.

"It may be said, what if this reliance should be disappointed? Redress must then be sought from retaliation, which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.

"Or it may be asked, what if there is no rule in the country of the recaptured? I answer first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture, but there is a law of habit, a law of usage, a standing and known principle on the subject in all civilized commercial countries; it is the common practice of European States in every year to issue proclamations and edicts on the subject of prize, and till they appear, Courts of Admiralty have a law and usage on which they proceed from habit and ancient practice as regularly as they afterwards conform to the express regulations of their prize acts. But, secondly, if there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule, and rest on the presumption that *that* rule will be adopted and administered in the future practice of its allies.

"Again, it is said that a country applying to other countries their own respective rules will have a practice discordant and irregular; it may be so, but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections, it

is to be observed that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety; a regulation may be extremely unfit to be made which yet shall be extremely fit, and the only fit rule to be observed towards other parties who have originally established it for themselves.

"So much it might be necessary to explain myself on the mere question of propriety, but it is much more material to consider what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution on salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle; in such case it adopts their rule and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject. It was clearly so recognized in the case of the 'San Iago'—a case which was not, as has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir E. Simpson), which records the practice and rule as it was understood to prevail in his time. 'The rule is, that England restores on salvage to its allies, but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.'

"I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law. At the breaking out of war it is the constant practice of this country to condemn property seized before the war if the enemy condemns, and to restore if the enemy restores.

"It is a principle sanctioned by that great foundation of the law of England, Magna Charta[1] itself, which prescribes that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

"In recaptures it is observable that the liberality of this country outsteps its caution; it restores on salvage without inquiry till it appears that the ally pursues a different rule. It may be said, there may be inequality and hazard in this prompt liberality, and we may restore when the ally condemns; and so the fact has been, for it is not to be denied that before the case of the 'San Iago' had introduced a more accurate knowledge of Spanish law, restitution of Spanish property on recapture had passed as of course; the more accurate rule, however, is that which I have laid down."

United States.—The law relating to recaptures is to be found in Act of Congress of 3 March, 1800,[2] which provides by section 1—

"That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel acting under authority from the Government of the United States shall appear

[1] Art. XLI.
[2] C. 14, Satutes at Large, U.S.A., Vol II, 16.

to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States or under authority or pretence of authority from any prince, Government, or State against which the United States have authorized or shall authorize defence or reprisals, such vessels or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage if retaken by a public vessel of the United States one-eighth part, and if retaken by a private vessel of the United States one-sixth part of the true value of the vessels or goods so to be restored, allowing and excepting all imports and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war before such capture or afterwards and before the retaking thereof as aforesaid, the former owner or owners on the restoration thereof shall be adjudged to pay for and in lieu of salvage, one moiety of the true value of such vessel of war or privateer."

By section 2, if the recaptured vessel or goods belonged to the Government, provided the vessel were unarmed, the salvage is to be one-sixth if recaptured by a private vessel, and one-twelfth if recaptured by a public vessel—

"And for the recapture as aforesaid of a public armed vessel or any goods therein, one moiety of the true value thereof when made by a private vessel of the United States, and one-fourth part of such value when such recapture shall be made by a public armed vessel of the United States."

Condemnation before recapture.—The "Star"[1] was an American ship which during the war with Great Britain had been captured by a British cruiser, and, after condemnation in the British Courts, sold to a British merchant. Whilst sailing under the British flag as a trading vessel, she was recaptured by the American private armed ship "Surprise."

It was contended on behalf of the original proprietors that by section 5 of the Act of Congress of 26 June, 1812,[2] the property of subjects and neutrals recaptured from the enemy ought to be restored on payment of salvage, without reference to the fact whether they had been previously condemned or not.

If the case, said Story, J., stood on the Act of 1800 alone, it was perfectly clear that the right of the proprietor was barred, for the Act expressly excepts from its operation all cases where the property had been condemned by competent authority, and the same result flowed from the principles of international law.

"It is admitted on all sides by public jurists that in cases of capture a firm possession changes the title to the property; and although there has been in former times much vexed discussion as to the time at which this

[1] 3 Wheat., 78 (1818).
[2] C. CVII, Statutes at Large, U.S.A., Vol. II, 759.

change of property takes place, whether on the capture or on pernoctation or on the carrying *infra praesidia* of the prize, it is universally allowed that, at all events, a sentence of condemnation completely extinguishes the title of the original proprietor and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property recaptured from an enemy after condemnation would by the law of nations be lawful prize of war in whomsoever the antecedent title might have vested."

The learned judge then cited the fifth section of the Act of 1812:—

"That all vessels, goods, and effects the property of any citizen of the United States or of persons resident within and under the protection of the United States or of persons permanently resident within and under the protection of any foreign prince, Government, or State in amity with the United States, which shall have been captured by the enemy and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the *lawful owners* upon payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned or by the decree of any court of competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law."

He refused to admit that the section had adopted the principle of *jus postliminii* reserved to British subjects by the statutes of George II and George III, even after condemnation.

The section contained no repealing clause of any of the provisions of the Act of 1800, and therefore he held that both Acts were to be construed together, and except so far as there was any repugnancy between them to be considered as in full force. The section was not free from doubt, but every portion of it might, by the fair rules of interpretation, be deemed affirmative of the existing law. Lawful owners meant lawful owners at the time of the recapture, and they were not the original proprietor, but the persons who had succeeded to the title under the decree of condemnation.

"There does not, therefore, seem any solid reason on which to rest the construction contended for by the claimant. And these are the most weighty reasons, founded upon public inconveniency, upon national law, and upon the very terms of the Salvage and Prize Acts for the contrary construction. In considering the section in question as merely affirmative, every difficulty vanishes, and the symmetry of a system apparently built up with great care and caution, as well as in strict accordance with the received principles of public law, is maintained and enforced."

Salvage an incident to the question of prize.—In the "Adeline,"[1] American property was restored on payment of salvage, although no claim for salvage had been made.

[1] 9 Cranch, 244 (1815).

"Recaptures," said Story, J., "are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas *jure belli* out of the hands of the enemy. . . . The Court, then, has a legitimate jurisdiction over the property as prize, and having it, will exert its authority over all the incidents. It will decree a restoration of the whole or of a part; it will decree it absolutely or burdened with salvage, and whether the salvage be held a portion of the thing itself or a mere lien upon it, or a condition annexed to the principal question of prize and within the scope of the regular prize allegation."

The "Adeline" was an American private armed vessel captured by a British squadron, which put a prize crew on board and ordered her to Gibraltar. After being six days in possession of the British, she was recaptured by the American privateer "Expedition," and carried to New York. The vessel was restored by consent on payment of one-half for salvage.

The recaptors claimed to be entitled under the Act of 1800 to one-half the value of the cargo as well. Upon this point Story, J., said:—

"We are all, however, of a different opinion. The statute is expressed in clear and unambiguous terms. It does not give the salvage of one-sixth part of the value upon the goods the cargo of an unarmed vessel, but it gives it upon any goods recaptured, without any reference to the vehicle or vessel in which they are found. We cannot interpose a limitation or qualification upon the terms which the Legislature has not itself imposed, and if there be ground for higher salvage in cases of armed vessels, either upon public policy or principle, such considerations must be addressed with effect to another tribunal."

Recapture of the property of allies.—By section 3 of the Act of 1800, it is provided—

"That when any vessel or goods which shall be taken as prize as aforesaid shall appear to have belonged to any person or persons permanently resident within the territory and under the protection of any foreign prince, Government, or State in amity with the United States, and to have been taken by an enemy of the United States, or by authority or pretence of authority from any prince, Government, or State against which the United States have authorized or shall authorize defence or reprisals, then such vessel or goods shall be adjudged to be restored to the former owner or owners thereof, he or they paying in lieu of salvage such proportion of the true value of the vessel or goods so to be restored as by law or usage of such prince, Government, or State within whose territory such former owner or owners shall be so resident, shall be required on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture made by the authority of such foreign prince, Government, or State; and where no such law or usage shall be known, the same salvage shall be allowed as by the first section of this Act. Provided that no such vessel or goods shall be adjudged to be restored to such former owner or owners in any case where the same shall have been, before the capture thereof, condemned as prize by competent authority, nor in any case where by the law or usage of the

prince, Government, or State within whose territory such former owner or owners shall be resident as aforesaid, the vessel or goods of a citizen of the United States under like circumstances of recapture would not be restored to such citizens of the United States. Provided also that nothing shall be construed to contravene or alter the terms of restoration in cases of recapture which are or may be agreed on in any treaty between the United States and any foreign prince, Government, or State."

It will be thus seen that in the restitution of the property of alien friends or allies as well as of neutrals the principle of reciprocity is applied by American law. In the "Adeline" part of the cargo was claimed by French subjects, some residing in the States and some in France, and part by *alien friends*.

"As to the claims of the parties domiciled in France," said Story, J., "whether natives or Americans or other foreigners, their rights depend altogether upon the law of France as to recaptures; for by the Act of Congress as well as by the general law, in cases of recapture the rule of reciprocity is to be applied. If France would restore in a like case, then we are bound to restore; if otherwise, then the whole property must be condemned to the recaptors. It appears that by the law of France in cases of recapture, after the property has been twenty-four hours in possession of the enemy, the whole is adjudged good prize to the recaptors whether it belonged to her subjects, to her allies, or to neutrals. We are bound therefore in this case to apply the same rule, and as the property in this case was recaptured after it had been in possession of the enemy more than twenty-four hours, it must so far as it belonged to persons domiciled in France be condemned to the recaptors."

Actual or constructive capture.—Military salvage will not be allowed unless there is an actual rescue from the enemy, but it is not necessary that the prize should have been in the actual possession of the enemy; it is sufficient if it was under his power.

The "Franklin"[1] was a British ship and cargo, which, owing to alleged distress, was recaptured when putting into a Spanish enemy port whilst deviating from her course. In refusing military salvage Sir William Scott said that he knew of no case

"in which military salvage had been given where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case when possession, if not absolute, was not almost inseparable, as when the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy. In such cases the same hazard is incurred by the salvor, and the reason exists to hold out a stimulus to recaptors. But in this case there was no enemy to encounter. The danger to the parties was contingent only, and though probable to occur, had not actually occurred."

[1] 4 Rob., 147 (1801).

The learned judge, however, awarded civil salvage—£500 and expenses.

The "Edward and Mary"[1] was a British merchantman which, separated from her convoy in a storm, was brought to by a French lugger, whose master ordered her to stand by until the storm moderated sufficiently to send a boat on board. They continued alongside for some hours, when the British frigate, the "Arethusa," came up, chased, and captured the lugger. During the chase the "Edward and Mary" escaped and rejoined the convoy.

Although Sir William Scott arrived at the conclusion that the recapture did not come within the statute, since the prize never came into the actual and bodily possession of the recaptor, yet it was still a case for salvage under the general maritime law, and he awarded the same rate as if it had come within the Act. On the question of possession by the enemy, he said:—

"It appears that the French vessel brought him to, and declared herself a French privateer, and ordered him to lie to, but owing to the boisterous state of the weather she did not send a man on board. I can by no means agree to what has been advanced in argument that it was on this account no capture. The sending of a prize-master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to and obey the direction of the French lugger and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist and no prospect of escape."

In the case of the "Pensamento Feliz,"[2] a Portuguese vessel with a cargo belonging to British and Portuguese merchants, Sir William Scott granted military salvage to the "Endymion" frigate which had sent her boats into the port of Muros, in Spain, where the prize had taken refuge in distress, and brought her out. Muros had been seized by the French, who had momentarily retired on another expedition; but since they might have returned whenever they chose, and would certainly have seized the vessel if they had done so, the learned judge found that the vessel was sufficiently within their power, though not in their actual possession.

Hostile recapture.—The proprietary rights of the captors are as a rule divested by hostile recapture, escape, or voluntary discharge of the prize. Consequently, the Courts of the captors which by a lawful capture had acquired jurisdiction over the prize, although it might happen to be lying out of their jurisdiction, lose such jurisdiction by circumstances such as the law of nations can notice.

[1] 3 Rob., 305 (1801). [2] 1 Edw. Adm., 115 (1809).

"Recapture, escape, or a voluntary discharge of the captured vessel," said Marshall, C.J., in Hudson *v.* Guestier,[1] "would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing and of his power over it."

It is the possession of the captor which gives the jurisdiction to the sovereign.

So in the case of the "Diligentia,"[2] the voluntary relinquishment by Admiral Berkley of his control over the Danish ships, induced by some mistake in law or fact, completely divested all the rights of himself and those under him.

Rerecapture.—Where a *hostile* ship is captured and afterwards recaptured by the enemy and then recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last recaptors are entitled to all the rights of prize, for by the first recapture the whole right of the original captors has been wholly divested.

In the case of the "Lucretia" (1778), the Court was disposed, though apparently in departure from more ancient precedents, to consider the original taker as the captor and the subsequent taker as the recaptor, entitled to a high salvage.

But in the case of the "Polly" (1780), which had been rescued by the American crew and retaken and condemned to the last captor by the Vice-Admiralty Court in New York, upon the appeal to the Lords of Appeal by the first captor, it was held that the latter had not completed his possession, that the incipient interest which had been acquired by the first taker was entirely divested by the subsequent rescue, and that the final British captor was the efficient captor, and as such entitled to the whole benefit of the prize.[3]

The same decision was given in the case of the "Marguerite" (1781), where the first recapture was made by a French frigate.

According to Valin, by an arrêt of 1748 the same rule was established in the French Courts.[4]

"Veut et entend sa majesté que les prises des navires ennemis faites par ses vaisseaux, ou par ceux de ses sujets armés en course, recoussés par les ennemis et ensuite reprises sur eux, appartiennent en entier au dernier preneur."

The law of the United States is also the same. The "Astrea"[5] was an enemy's vessel captured by an American privateer, recaptured by another enemy's vessel, and again recaptured by another American privateer.

[1] 4 Cranch, 293 (1808); 6 Cranch, 281.
[2] 1 Dod. Adm., 404 (1814).
[3] 4 Rob., 217, note.
[4] L'Ord., ii, 257–9; Traité des Prises, c. VI, sec. 1; Pothier, de Propriété, No. 99.
[5] 1 Wheat., 125 (1816).

"An interest," said Chief Justice Marshall, "acquired by possession is divested by the loss of possession, from the very nature of a title acquired in war. The law of our own country as to salvage settles the question."

Rights of recaptors.—The right of the recaptors to salvage is extinguished by a subsequent recapture, followed by a regular sentence of condemnation, carried into execution and divesting the owners of their property.

The "Charlotte Caroline"[1] was a Swedish vessel captured by the Danes, recaptured by the British, and again recaptured by the Danes, and condemned for having sailed under a British convoy. She was, however, restored by royal authority, and the master again put into possession of his ship, and eventually reached her original destination of a British port.

"The sentences of the Prize Court," said Sir William Scott, "are abolished by an authority which, according to the constitution of that country, is perfectly competent to do such an act; and the legal fiction of conversion is completely done away by the fact of restitution. The master is reintegrated in his rights, and the vessel sails to their country exactly in the same state as if she had proceeded on her original voyage and had suffered no interruption from the Danish cruiser."

The learned judge accordingly held that since the recapture nothing had occurred to defeat the right of the recaptors to salvage.

The "Blenden Hall"[2] was a British vessel captured by a French frigate, which took out the crew and attempted to scuttle her. She was discovered in a derelict condition by the post-office packet "Eliza," which put an officer and ten men on board to navigate the ship back to England. In the hurry of leaving the packet, the crew forgot to take a log-glass, a watch, and a chart of the Channel. When close to Plymouth, seeing a ship, they hoisted a signal of distress, which was answered by the British cruiser "Challenger." The commander of the "Challenger," instead of complying with the request for these implements, took possession of the "Blenden Hall," brought her into Plymouth, and claimed as joint salvors.

In declaring that the King's ship had no claim as joint captor, since there was no such necessity as to justify her interference, Sir William Scott held that recaptors who have obtained possession of a ship as salvors lawfully, and have thus acquired a legal interest, cannot be divested of that right until adjudication has taken place in a court of competent authority.

"It is not," he said, "for the King's officers or any other persons, on the ground of superior authority, to dispossess them without cause.

[1] 1 Dods. Adm., 192 (1812). [2] *Ibid.*, 414 (1814).

Cases may certainly exist in which the interference of the King's officers may be not only justifiable, but even laudable. They may find persons in possession who are unfit from inexperience to be trusted with valuable property, or who have been guilty of gross misconduct, which may render their removal proper and necessary. But these necessities must be made apparent to the Court; and persons taking possession and bringing in a ship under such circumstances must understand that it is their duty, in the first place, to justify themselves for the steps they have taken."

Abandonment by original captors.—When there is voluntary abandonment of a prize by the original captor and it is captured by another vessel, the latter is entitled to the benefit of prize. The origin of this principle may be traced to the civil law, which distinguished between a *voluntary* and *compulsory* abandonment of possession, the former changing the right of property, whilst the latter had no such effect.[1]

The "Lord Nelson"[2] was an English vessel captured by a French privateer and abandoned. It appears that the English master, finding escape impossible, to prevent the enemy carrying the vessel into a French port, cut away her masts. Finding it impossible to carry her off in this condition, and sighting another prize, the "Lord Nelson," her crew having been taken out, was left to her fate. She was brought in by the English sloop-of-war "Cherokee," and the question for the Court was whether this should be considered merely as a case of salvage on recapture, or as a derelict.

In allowing a moiety to the recaptors as salvage, Sir William Scott said:—

"Here there was a total abandonment of their inchoate rights as captors, not under terror of any British force, but solely, as it appears, in consequence of this act of the master. Suppose, therefore, that after this voluntary abandonment the ship had been met by some French cruiser, and that by means of jury-masts they had succeeded in carrying her into a French port; can there be any doubt that she would have been prize to the second captor? There was a total extinction of the rights of the first captor, who had quitted the prize upon finding he could not carry her into port, and having at the same time another object in view better worth his attention. There was no application of force or terror; it was a voluntary quitting, and the ship was therefore found in the situation of a derelict, abandoned by all who could pretend to any right in her."

The "John and Jane"[3] was an English vessel captured by the French and abandoned. In granting salvage, Sir William Scott said:—

[1] Just. Inst., II, 1, secs. 46, 47. See also Bynkershoek, Q. J. Pub., c. 4, 35; 2 Azuni, part 2, c. 4, art. 2, secs. 1, 3, 7; 2 Woodeson, 454; Goss *v.* Withers, 2 Burr, 693.
[2] 1 Edw. Adm., 79 (1809); the "Mary Ford," 3 Dall., 188 (1795).
[3] 4 Rob., 216 (1802).

"I do not think that this is to be taken as a case of derelict. The vessel appears to have been captured by the French and deserted, but there is no *animus derelinquendi* imputable to the owner. The French captors had left the vessel because, perhaps, they did not wish to be encumbered with her or delayed in their cruise. But those who were in possession as agents of the proprietor had not committed any act of dereliction. The principle of derelict does not, in my opinion, apply. If the enemy had kept possession and maintained a contest, the law would have given only one-sixth to a recaptor. Can it be said that the merit of the salvors is greater, or that they are entitled to a greater reward because no person was left on board the ship to defend her?"

Under the circumstances, the learned judge awarded one-fourth, which was going further than on strict principle was warranted.

The same course was followed in the "Gage,"[1] which was a British vessel with a cargo of timber which had been captured by a French privateer, and found at sea by a British cruiser with a fire burning in her cabin.

In allowing one-fourth as salvage it was thought, upon the depositions alone, that it bore the appearance of a case of derelict, and there was no evidence to show why the prize had been abandoned. As there was nothing to show compulsory abandonment, the Court held that it was not restricted to the rate of salvage prescribed on recapture by the Prize Court, since this was not strictly a recapture, but was entitled to exercise discretion in allowing a larger award. One-fourth was allowed.

In the case of the "Diligentia,"[2] there had been a seizure of some Danish vessels in a Portuguese port by one British Admiral, who withdrew from possession and left the vessels under the control of their Danish masters, and a second seizure by another British Admiral at a subsequent date. In deciding for the second captors, Sir William Scott said the question was not only

"which is the person by whom a seizure was made, but which is the party legally entitled to the character of captor; for there may be many successive captors, but only one can be legally entitled as captor to the benefit of prize. If one party takes a vessel and afterwards abandons her, and then another takes the same vessel, the last seizor is in law the only captor. To this it must be added that the act of the commander is binding upon the interests of all under him, and that he alone is responsible for costs and damages. He has a right to examine the ship's papers and to detain or not, according to his own notions of propriety. He may, perhaps, act erroneously, and relinquish what would have been good prize to himself and his crew. But if he does dismiss what he had before seized upon, the interest of himself and all under him is concluded by his act, and the same vessel lies open to seizure by any other captor who may exercise a sounder discretion."

But if the abandonment is *involuntary*, produced by fear or

[1] 6 Rob., 273 (1806). [2] 1 Dod., 404 (1814).

superior force, especially if produced by the second captors, the rights of the original captors are completely revived.

The "Mary"[1] was an English ship seized by the privateer "Cadet," abandoned by her in fear of the armed brig "Paul Jones," supposed to be a British cruiser, but which was, in fact, an American privateer.

In delivering the opinion of the Court, Johnson, J., said:—

"We are of opinion that the facts stated make a clear case of tortious dispossession on the part of the 'Paul Jones.' The privateer 'Cadet' had with great gallantry captured the 'Mary' and been in possession of her a night and a day. The prize was close in upon the American coast and making for a port which was open before her. It was not until the superior sailing of the 'Paul Jones' made it manifest that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize crew abandoned her. There exists not a pretext that this abandonment was voluntary, or would have taken place but for the hostile approach of the 'Paul Jones.' Whether the *vis major* acted upon the force or the fears of the prize crew is immaterial, since actual dispossession ensued."

By Article IX of the ordinance of 1681,[2] if a captured vessel is abandoned by the enemy without being recaptured, or if by storms or other accident it returns into the possession of French subjects, without having been carried into an enemy's port, it must be restored to the owner if claimed within a year and a day, although the possession of the enemy may have continued more than twenty-four hours.

"Si le navire," runs the ordinance, "sans être recous, est abandonné par les ennemis, ou si par tempête ou autre cas fortuit il revient en la possession de nos sujets avant qu'il ait été conduit dans aucun port ennemi, il sera rendu au proprietaire qui le réclamera dans l'an et jour quoiqu'il ait été plus de vingt-quatre heures entre les mains des ennemis."

Pothier, as Sir Robert Phillimore points out, considers that these words, *avant qu'il soit entre dans aucun port ennemi*, are to be understood not as restricting the right of restitution, on payment of salvage, to the particular case mentioned, of a vessel which is abandoned by the enemy before being carried into port, which case is mentioned merely as an example of what ordinarily happens.

"Parceque c'est le cas ordinaire auquel un vaisseau échappe à l'ennemi qui l'apris, ne pouvant plus guère lui échapper lorsqu'il a été conduit dans son port."[3]

Valin, on the contrary, contends that the terms of the ordinance

[1] 2 Wheat., 123 (1817).

[2] Valin, Ord., ii, p. 257–9. "Traité des Prises," c. VI., sec. 1. See also D'Abreu, "Prize," t. II c. V, sec. 10.

[3] De Propriété, No. 99.

are to be literally construed, and that the right of the original proprietor is completely divested by the carrying into the enemy's port. He considers that this species of salvage is analogous to that in the case of shipwreck, and that the recaptors are entitled to one-third of the value of the property saved. This is the view taken in the United States in the case of the "Mary Ford,"[1] which was a British ship captured by a French squadron and abandoned and set on fire, as the latter was too weak to leave a prize crew on board. It was found on the high seas by the American ship "George" and brought in. One-third was allowed to the recaptors in consideration of the great peril they underwent and the services rendered, and two-thirds were adjudged to the French captors, since the Court were not satisfied that the abandonment under the circumstances revived and restored the rights of the original British proprietors. Azuni, however, maintains that the rate of salvage is not regulated by the ordinance, but is discretionary, to be apportioned according to the nature and extent of the services rendered, which can never equal the rescue of property from the hands of the enemy, or the recovery of goods lost by shipwreck.[2] These grounds are certainly very weak. Rescue from the enemy may be effected by the mere sight of superior force, whilst the carrying in of a dismantled ship may be attended with great hazard and labour. Emerigon[3] also is opposed to Valin, and supports his view by citing c. 287 of the "Consolato del Mare."

Recapture by neutrals.—When a prize is abandoned by the original captors and it is found and brought in by neutral salvors, the neutral Court has jurisdiction to award salvage, to determine to whom the residue ought to be delivered, but not to inquire into the validity of the capture if there has been an actual or constructive possession by the original captors. In the "Mary Ford,"[4] the doctrine was thus laid down as sound:—

"The principle that neutral nations ought not to decide respecting the lawfulness or unlawfulness of capture if it appears that the captor and the nation from whom the property is taken are at war with each other, and the captors or their vendees are in possession of the property, save where the territorial rights of the neutral or the rights of their citizens are involved in the question; and that neutrals are always to take the existing state of things as right, so that if either of the Powers at war, or those to whom they have transferred it, are in possession of a thing taken from their enemy in war, neutral Powers are to suppose them lawfully possessed, and ought not to inquire how long or under what circumstances they have possessed them. To interfere and decide in such cases must necessarily imply a partiality contrary to the idea of neutrality, for they must either give greater firmness to the capture by deciding it to be lawful, or weaken

[1] 3 Dall., 188.
[2] Pt. II, c. IV, secs. 8, 9.
[3] "Des Assurances," I, p. 504–5.
[4] 3 Dall., 192 (7796).

and render it less secure by determining it to be unlawful. Neither are neutral Powers to give aid to either party by conducting their prizes for them when they are too weak to protect and conduct them."

Donation by original captors to neutrals.—Where the original captors make a donation of the prize to neutrals who carry it into a neutral port, the latter are entitled to salvage, and the original proprietors to the residue.

The "Adventure"[1] was a British vessel captured by two French frigates. Part of the cargo having been taken out, the "Adventure" was duly presented to the American crews (then neutral) of two vessels which the frigates had just taken and burnt. By the time the prize was carried to an American port war had also broken out between England and America.

"In this case," said Mr. Justice Johnson, "the most natural mode of acquiring a definite idea of the rights of the parties in the subject matter will be to follow it through the successive changes of circumstances by which the nature and extent of those rights were affected—the capture, the donation, the arrival in the neutral country, and the subsequent state of war. As between belligerents capture undoubtedly produces a complete devesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all captures to the scrutiny of judicial tribunals as the only practical means of furnishing documentary evidence to accompany vessels that have been captured for the purpose of proving that the seizure was the act of sovereign authority and not of mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship originally British (the 'Flad Oyen').[2] Upon the donation, therefore, whatever right might in the abstract have existed, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize-master, navigating the prize in pursuance of orders from his commander. The vessel remained liable to British recapture on the whole voyage, and on her arrival in neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing in possession which the municipal law (civil and common) gives for care and labour bestowed upon it. The question then recurs, is this a case of salvage? On the negative of the proposition it was contended that it is a case of forfeiture under the municipal law, and therefore not a case of salvage as against the United States; that it was an unneutral act to assist the French belligerent in bringing the vessel *infra praesidia* or into any situation where the rights of capture would cease, and therefore not a case of salvage as against the British claimant. But the Court entertains an opinion unfavourable to both these objections. This could not have been a case within the view of the Legislature when passing the Importation Act of March, 1809. The ship was the plank on which the shipwrecked mariners reached the shore, but to have cast into the sea the cargo, the property of a belligerent, would have been to do

[1] 1 Wheat., 127, note (1814). [2] 1 Rob., 135.

him an injury by taking away the chance of a recovery, subject to which they took it into their possession. Besides, bringing it into the United States does not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as the Court is of opinion it did, legal provision existed for disposing of it in such a manner as would comport with the policy of those laws. At last, they could but deliver it up to the hands of the Government to be reshipped by the British claimants, or otherwise appropriated under the sanction of judicial process. And such was the course they pursued. Far from attempting any violation of the laws of the country, upon their arrival they delivered it up to the custody of the laws, and left it to be disposed of under judicial authority. The case has no feature of illegal importation, and cannot possibly have imputed to it the violation of municipal law. As to the question arising on the interest of the British claimants, it will, at this time (war having supervened), be a sufficient answer that they who have no rights in this Court cannot urge a violation of their rights against the libellants. But there is still a much more satisfactory answer. To have attempted to carry the vessel *infra praesidia* of the enemy would, unless it could have been excused on the ground of necessity, have been an unneutral act. But where every exertion is made to bring it into a place of safety, in which the original right of the captured would be revived and might be asserted instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the claimant."

Accordingly one-half was allowed as salvage, and the residue stood over till the end of the war unless previously confiscated by the Government.

Donation by original captors to enemies.—By section 12 of chapter 287 of the "Consolato del Mare"—

"If an enemy on capture of a ship or cargo make a gift of it, such a donation or gift shall not be valid on any account; except that if a gift is made of the ship or cargo to those to whom it belonged, such donation shall be valid. But if the captor bargains with the master in these words: 'We are willing to give you your ship for nothing, but must have ransom for the cargo,' such a donation shall not be good; because in the case of which we are now speaking, the enemy had not carried it into a place of security, so as to say that he might not lose it, notwithstanding that he might so far have obtained power over his prize so as to be able to burn or sink it, though in such case it would be totally lost both to him and to the owner; it is to be understood, therefore, that if the cargo is ransomed, the master to whom his ship has been so given is bound to contribute to the ransom paid for the cargo according to the value of the ship, and the same rule shall be observed *e contra* also and applied equally to the ransom of ship or cargo."

Ransom.—Just as a master may hypothecate his cargo on freight in a foreign port for repairing damages sustained at sea to enable him to continue his voyage, and just as he may throw overboard even the whole of the cargo in cases of extreme necessity, so by the general maritime law he may bind by his contract for ransom the whole of his cargo as well as the ship.

All these principles are contained in the Laws of Oleron. In a note to Article IX it is said that if pirates take the ship and cargo entire and both are redeemed for a sum of money, the average for that shall be common, and all those concerned shall contribute.[1] These provisions have been copied into the maritime codes of almost every State in Europe. For instance, "Les Costumes de la Mar" of the Black Book of the Admiralty of England contain the following provisions:—

"C. CLXXXV.—The managing owner of a ship or vessel who in the open sea or in port or on any coast or in other place shall meet with armed vessels of the enemy may parley with, and make a convention with the captains and with the admiral for a quantity of money in order that they may do no harm to him nor to his ship. And if there are merchants on board that ship or vessel, he ought to tell them the convention which he will make or has made with them, that is, with the captains and the admiral of that armed fleet, and altogether ought to agree and ought to pay that ransom which the managing owner of the ship or vessel has agreed to with the captains and with the admiral[2] of that armed fleet. And they ought to pay for the goods in common by shillings and pounds or by besants, and the managing owner of the ship ought to contribute for half the value of the ship or vessel. And if there be no merchants on board the ship or vessel, the managing owner of the ship ought to take counsel with the officers of the poop and with the mate and with the officers of the forecastle. And if the managing owner of the ship pays the ransom of which we have spoken with the counsel and with the consent of all those above mentioned, the merchants to whom the goods belong ought not to dispute anything, provided the managing owner of the ship pays for half of that which the ship is worth. But, nevertheless, if the managing owner of the ship or vessel meets, as above said, with the armed vessels which shall not be enemies, and he wishes to give them a present or refreshment if there are merchants in the ship, he ought to speak to them and inquire if the merchants are willing to do so, and the managing owner of the ship ought to say and do this with the counsel of all those above mentioned. And if the managing owner of the ship does not act with the consent of the merchants or with the counsel of those above mentioned, and by his own authority makes a convention or gives refreshment without the knowledge of the merchants or without the counsel of the above-mentioned persons, the managing owner of the ship ought to pay it out of his own property, for the merchants are not liable to give him anything nor to replace anything of the expense or of the compact for the refreshment which he has given to those armed vessels."[3]

Subsequent chapters deal with the necessity of communicating the agreement, if possible, to the merchants, and with their contributions to the ransom.

[1] Sea Laws, 136.

[2] The use of the word admiral fixes the date of this law at a period subsequent to the Fourth Crusade, i.e. *c.* 1195.

[3] Black Book of the Adm., Vol. III, 351.

The provisions relating to ransom contained in the "Consolato del Mare," are to be found in chapter 287.

"11. If the enemy after a capture comes to any place where he takes a ransom for his prize, if the proprietors wish to have their vessel or cargo again, he or they who have ransomed her are bound to deliver her up to the original owners on payment of the debt and charges and some further allowance besides if they choose to accept it.

"17. If the master shall redeem any part of the cargo or make any agreement *with the consent* of the major part of his co-partners by which he shall regain the ship or cargo, he may compel them to contribute, by course of justice, because they are as much under an obligation to him as if they had agreed to take part in building or purchasing a new ship.

"18. But if the master makes any agreement *without the consent* of his partners or the major part of them, they are not bound to anything unless they like it; nor is the master answerable to them for the rights and interests which they had in the ship at the time of capture; saving for any previous accounts which might be still remaining unsettled respecting their shares in the ship or cargo at the time it was taken by the enemy.

"19. If the original proprietors are disposed to resume their shares and the master makes any opposition, the justice of the country may compel him to acquiesce, for there can be no ground of reasonable resistance on his part if they are willing to pay their proportion of the expense; and it would be manifestly unjust that any one should dispossess the rest of their property.

"20. But if the master or any one for him redeems his ship or cargo, after the enemy has gained a just title in it, and those who were part owners refuse to pay, as before specified, the master or his agent ought to repeat his demand upon them several times and call upon them to pay their share; and if they still refuse, it shall be put up to auction, with permission of the Government, and be disposed of to the highest bidder.

"21. If the ship or cargo shall be sold for more, after such refusal, than the ransom paid, the surplus shall be paid to the owners, according to their shares, if the master chooses it; otherwise, he is not obliged. And the master shall have the privilege of retaining the goods in question at the price that others are willing to give for them.

"22. If the sale shall produce *so much* as the ransom; if the master made the ransom without the consent of his partners, they are not bound for the deficiency unless they choose it; and therefore it is reasonable that the master or his agent should have the privilege, at the price that any other person would give, as the deficiency would fall upon him; saving, however, that if any of the partners are inclined to resume their shares, they are bound to make good the deficiency to him *pro rata*. All the reasonings and cases and conditions above mentioned shall be taken under the supposition that the enemy had carried the prize into a place of security and that the ransom or sale had been made fairly and without fraud."

It will be observed from the last paragraph that the possession of the prize by the captors is conceived to be determined by

carrying it into a place of security, the *infra praesidia* of modern practice. Under "Les Costumes de la Mar," actual control in any place by the captors is deemed sufficient.

This power of hypothecation is recognized by most of the older jurists. Bynkershoek, in his treatise on bottomry, describes it as—

"Contractus quo tota navis et partes, etsi actum est, etiam onus pro pecunia erogata pignori ponitur; Haec omnia obligavit magister et obligare potuit."[1]

And this principle was recognized in the common law courts in England, in the reign of Charles I. In Justin *v.* Ballam,[2] decided in the 1st of Queen Anne, it was held that—

"By the maritime law, every contract of the master implies an hypothecation; but by the common law it is not so, *unless* it be so expressly agreed."

And so with ransom bills, which were agreements between the master of a captured vessel or cargo and the captor, by which the latter permitted the former to depart with his vessel and a safe-conduct or licence in consideration of a sum of money secured by a document executed in duplicate, one of which is kept by the captor, and which is properly called the ransom bill, and the other by the master which is called his safe-conduct.

It was unanimously decided in Ricord *v.* Bettenham[3] that an action by an alien enemy upon a ransom bill was maintainable, and it was agreed that such an action had been allowed in other European countries and upon principles which could not be disputed.

This view was subsequently overruled in the case of Anthon *v.* Fisher,[4] although Lord Mansfield dissented from the opinion of the majority, holding that the contract of ransom, if allowed to be made by a subject, is an implied suspension of the disability to sue so far as the remedies on that contract are concerned. Upon appeal by the unanimous opinion, however, of all the judges of the Courts of Common Pleas and Exchequer, it was held that an alien enemy could not by the municipal law of this country sue for the recovery of a right claimed to be acquired by him in actual war.

"Even in the case of ransoms," said Sir William Scott in the "Hoop,"[5] "which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom."

[1] Q. Jur. Priv., lib. III, c. XVI.
[2] 1 Salk., 34.
[3] Burr. Rep., p. 1734 (1765).
[4] Doug. Rep., p. 649 n. (1781).
[5] 1 Rob., 196 (1799).

This is a technical objection which is supported neither by any principle nor by reason, and which is opposed to the general usage.

"The effect of this contract," says Wheaton, "like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy so far as respects the parties to the ransom bill, and consequently the technical objection of the want of a *persona standi in judicio*, cannot on principle prevent a suit being brought by the captor directly on the ransom bill."

It would appear, therefore, that Lord Mansfield's view is more consonant with sound morality and good policy and with the law of nations and the eternal rules of justice than the narrow and selfish purpose of the British Legislature.

"The practice in France," says Kent, "when a French vessel has been ransomed and a hostage given to the enemy, is for the officers of the Admiralty to seize the vessel and her cargo on her return to port, in order to compel the owners to pay the ransom debt and relieve the hostage; and this is a course dictated by a prompt and liberal sense of justice."[1]

Public vessels of war would appear not to be prohibited from ransoming ships which they have captured, but by an ordinance of 1756 privateers could only do so after they had sent three prizes into port.

In Spain, a privateer after the capture of three prizes may ransom any subsequent prize, apparently because she would not be in a condition to spare any more men for a prize crew.

The ransom of neutral vessels has been prohibited since 1782.

The practice was utterly prohibited in Sweden by a regulation of 1781; in Denmark, by one of 1810; in Holland, by an ordinance of 1781; and in Russia, apparently since 1787.[2]

Hautefeuille[3] is opposed to the majority of French and German jurists, who consider that ransom of neutral property is permitted by international law on the following grounds: (1) The seizure of neutral property ought to be pronounced lawful by a decision of a prize court; hence neutrals would be injured by demanding a ransom from them upon such a decision. To this Gessner replies that—

"The neutral consents to it, and no one takes from him the right of demanding that his vessel shall be seized and tried. Moreover, the ransom does not deprive him of the eventual benefit of a favourable sentence. The proceedings follow their course none the less, and if they end in clearing the vessel the captor of course must pay the ransom back. The neutral then has in this case the advantage of avoiding seizure and of freely continuing his voyage with his cargo."[4]

[1] Comm., Vol. I, 108. See also Pothier, "Traité de Propriété," No. 144.
[2] Atlay's Hall, 460, n.; Woolsey, Intro. Int. Law, p. 449.
[3] IV, 262–4. [4] 338–43.

(2) That by granting ransom to neutral vessels a nation and its cruisers are accessories, so to speak, to their carrying contraband to the other belligerent. To this Woolsey replies that the belligerent would provide for his interests in the directions given to his vessels of war, and, moreover, the safe-conduct would not permit the neutral vessel, if it had contraband on board, to take it to a blockaded port.[1]

Eventually these ransom bills were considered as contrary to public policy, inasmuch as they tended to relax the energy of war by depriving cruisers of the chance of recapture, and so about the middle of George III's reign the ransoming of captured vessels was discountenanced and expressly prohibited by a statute,[2] which inflicted a penalty on any British captor who restored upon ransom, and which declared that all ransom bills given by British subjects should be null and void.

They were, however, subsequently, in cases of necessity, allowed.

"Ransoms," said Sir William Scott in the "Ship Taken at Genoa,"[3] "have been forbidden as subject to great abuse, being in the common acceptation contracts entered into at sea by individual captors, and very liable to be abused to the great inconvenience of neutral trade. But even ransoms under circumstances of necessity are still allowed."

In the case of the "Gratitudine,"[4] Sir William Scott, in defining the power of the master to hypothecate his ship and cargo in cases of distress and jetison, states the principle upon which it is based:—

"For though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity the character of agent and supercargo is forced upon him, not by the immediate act and appointment by the owner, but by the general policy of the law, unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea as in intermediate ports into which he may be compelled to enter."

Analogous to cases of repairs caused by distress at sea or jetison is that of ransom—

"in which it is well known," says the learned judge, "that by the general maritime law a master could bind by his contract the whole cargo, as well as the ship; he could not go beyond the value of the goods, but up to the last farthing of their entire value, there is not a doubt but he might bind the cargo as well as the vessel; a very modern regulation of our own private law has put an end to *our* practice of ransoming, but I am speaking of the general maritime law and practice, not superseded by private and positive regulation."

[1] Intro. Int. Law, p. 449.
[2] 22 Geo. III, c. 25.
[3] 4 Rob., 388 (1803).
[4] 3 Rob., 240 (1801).

Where a hostage is given.—The ransom bill is not discharged by the death or recapture of the hostage, unless there is an express stipulation to that effect, since the giving of a hostage is only a collateral contract. A hostage is not an equivalent, but a collateral security. Giving a pledge only strengthens the obligation but does not discharge the debt, therefore the loss of such collateral security does not cancel the contract or discharge the debtor from his obligation to meet the ransom bill. And it was so held in Ricord *v.* Bettenham.[1]

Recapture of ransom bill.—According to Valin,[2] the recapture of the ransom bill puts an end to the rights of the original captor. The ransom bill becomes part of the capture made by the recaptor, and the persons of the hostile nations, who were the debtors of the ransom, are thereby discharged from their obligation under the ransom bill.

But if the bill has been transmitted to a place of safety, there appears to be no reason why the rights of the original captor should not be retained, although in practice they are not recognized.

Extent of safe-conduct.—The safe-conduct or passport merely insures the ransomed vessel against interference from or recapture by the cruisers of the captor or of its allies, but not against the perils of the sea. If, therefore, the ransomed vessel is lost at sea or becomes a total loss, the debtors are not thereby discharged from meeting the ransom bill.

But the vessel must not deviate from her course or exceed the time mentioned in the safe-conduct, except under stress of weather or unavoidable necessity. Any such deviation entails a forfeiture of the safe-conduct. If retaken under such circumstances, the debtors of the ransom are discharged from their obligations, which is merged in the prize, and the amount is deducted from the net proceeds thereof and paid to the first captor, whilst the residue is paid to the second captor.[3]

The present practice is governed by the Prize Act, 1864,[4] section 45, in which power is reserved to issue regulations by Order in Council, subject to which—

"Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the High Court of Admiralty as a Prize Court (subject to appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal consideration.

"If any person ransoms or enters into any contract or agreement for

[1] 3 Burr., 1734.
[2] Liv. III, lit. 9.
[3] Halleck, p. 672.
[4] 27 & 28 Vict. c. 25.

ransoming any ship or goods in contravention of any such Order in Council, he shall for every such offence be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in her Office of Admiralty, and on conviction to be fined in the discretion of the Court any sum not exceeding £500."

Ransom has never been prohibited by legislation in the United States, and it has been expressly held, in Goodrich *v.* Gordon,[1] that the Act of Congress of 2 August, 1813, which interdicted the use of British licences or passes, did not apply to contracts of ransom.

"Such contracts," said Thomson, C.J., "are sanctioned by the law of nations, and are not deemed a trading with the enemy, nor was the passport given by the captors upon the ransom and accepted by the master of the captured vessel in violation of the Act of Congress. It was merely a certificate given by the captors to serve as a passport and protect the ransomed vessel from all other armed vessels belonging to the nation of which the captors were subjects, and to prevent another capture."[2]

The general principles are admirably stated by Story, J., in the case of Maisonnaire *v.* Keating.[3]

"The second question is, whether it be competent for a friendly belligerent to demand or to take a ransom for restoring the property of a neutral after capture. It is argued by the defendant that every ransom supposes a vested right in the captors; that this does not exist in respect to neutrals, for the captors have only a right to bring in for adjudication; that neutral property is liable to condemnation only in case of delinquency; and that captors have no right to remit in behalf of their sovereigns a forfeiture for violation of neutral duties.

"It is not true, however, that the right to take a ransom is founded in a vested title in the captors to the captured property. For whether the property vest after twenty-four hours' possession or after bringing *infra praesidia* as seems the doctrine of the civilians; or after condemnation, as is the doctrine of Great Britain; it is clear that the right to take a ransom exists from the moment of capture. And by the general practice of the maritime world a decree of condemnation is deemed necessary to ascertain and confirm the inchoate title of the captors, at least in respect to the sovereign and subjects of their own country. Nor is a ransom, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or more properly, it is a relinquishment of all interest and benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, whether it be an interest *in rem*, a lien, or a mere title to expenses. In this respect there seems to be no legal difference between the case of a ransom of the property of an enemy and of a neutral. For if the property be neutral, and yet there be probable cause of capture, or if the delinquency be such that the penalty of confiscation might be justly applied, there can be no intrinsic

[1] 15 John, 6 (1818).
[2] See 2 Azuni, 313–16.
[3] 2 Gall., 325 (1815).

difficulty in supporting a contract by which the captors agree to waive their rights in consideration of a sum of money voluntarily paid or agreed to be paid by the captured. Indeed, the case stands upon a stronger ground than that of a ransom between enemies; for the latter have not in general a capacity to enter into contracts. The very law of war prohibits all commercial intercourse and suspends all existing contracts between enemies; and the case of ransoms is almost the only exception which has been admitted from the general rule. If, then, neither the subject matter nor the nature of the title or consideration nor the capacity of the parties presents any serious objection to the contract, as between a friendly belligerent and a neutral, it remains to consider if there be anything in the objection that it is a remitter of the right of forfeiture which belongs exclusively to the sovereign.

"The commission of the sovereign, in general, authorizes only captures of enemies' property. But without any express clause, this commission clearly extends to the capture of all neutral property seized in violating neutral duties, for in such case the property is deemed *quasi* enemies' property; and for the same reason it authorizes the bringing in of property under neutral passports and papers for adjudication where there is probable cause to suspect its real character, for until adjudication it cannot be ascertained whether it be entitled to the protection of the neutral character. If, therefore, the commission gives hostile property to the captors and enables them to deliver it up on ransom, it also enables them to do the same in respect to neutral property which has acquired a hostile taint, and the ransom is not, in the one case, any more an exercise of the sovereign's prerogative to remit a forfeiture than it is in the other. In both instances it is considered by the law of nations as a mere remitter of the rights of the captors acquired *jure belli*, and every prohibition of its exercise must expressly depend upon the municipal regulations of the particular country. Upon principle, therefore, the distinction of the counsel for the defendant as to the incompetency of a belligerent to deliver neutral property on ransom is unsupported, and there is not a scintillation of authority in its favour."

FORMALITIES OF RECAPTURE

Great Britain—

Recapture of a British Vessel

"261. It is the duty of the commander, if possible, to rescue any British vessel which he may find attacked or captured by the enemy.

"262. If he succeed in effecting the rescue of such a vessel, he may either at once send her in for adjudication, or at his option, unless she shall have been already carried into an enemy's port, or set forth or used by the enemy as a ship of war, allow her to prosecute her voyage and unlade and dispose of her cargo.

"263. Upon adjudication the Prize Court will order the vessel and cargo to be restored to their respective owners upon payment by them of prize salvage.

"264. If the commander shall have allowed the vessel so to prosecute her voyage, he will be allowed to defer proceedings for adjudication till the return of the vessel to a port within the United Kingdom.

"265. In case the vessel shall not within six months return to some port within the United Kingdom, the recaptors may nevertheless institute proceedings against the ship or goods in the Court exercising prize jurisdiction in England, and the Court may thereupon award prize salvage and may enforce the payment thereof either by warrant or arrest against the ship or goods or by monition and attachment against the owner.[1]

"266. The prize salvage which will be awarded to the recaptors for the recapture of any British vessel before she has been carried into an enemy's port is one-eighth part of the value of the prize; or in case the recapture has been made under circumstances of special difficulty or danger, a sum not exceeding one-fourth part of the value.[2]

"267. If, however, the vessel has, before her recapture, been set forth or used by the enemy as a ship of war, then upon recapture the original owner is not entitled to restitution, but both vessel and cargo will be condemned as lawful prize to the recaptors.[3]

"268. The commander will be justified in considering a vessel to have been set forth or used by the enemy as a ship of war if after capture she has been commissioned by the enemy as a ship of war, or has been used as a privateer, or has been armed by an enemy officer ostensibly in the exercise of authority; but not if no more has been done to her than the augmentation of her crew or the arming of her by persons not in authority.

Recapture of a British Prize

"269. It may happen that an enemy vessel which has been captured by a British cruiser is afterwards lost to an enemy's cruiser and finally recaptured by another British cruiser. The commander effecting such a recapture should send in the vessel for adjudication and the original captors are not entitled to restitution, but both vessel and cargo will be condemned as lawful prize to the recaptors.

Recapture of a Neutral Vessel

"270. If a commander recapture from the enemy a neutral vessel which would not have been liable to condemnation in the Prize Court of the enemy, he is not entitled to salvage; and should without delay and without taking ransom, set her free to prosecute her voyage.

Recapture of an Allied Vessel[4]

"271. If a commander recapture from the enemy an allied vessel, his duty is generally regulated by treaty. In default of treaty regulations, he will send her into a British port for adjudication; and the Prize Court will award salvage or not, according as the Prize Court of the ally would or would not have awarded salvage to an allied ship for recapturing a British vessel."[5]

[1] See Naval Prize Act, 1864, sec. 41, Appendix.
[2] *Ibid.*, sec. 40. [3] *Ibid.*
[4] "War Onskan," 2 Rob., 299 (1799).
Holland, Manual of Naval Prize Law, 76–79.

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